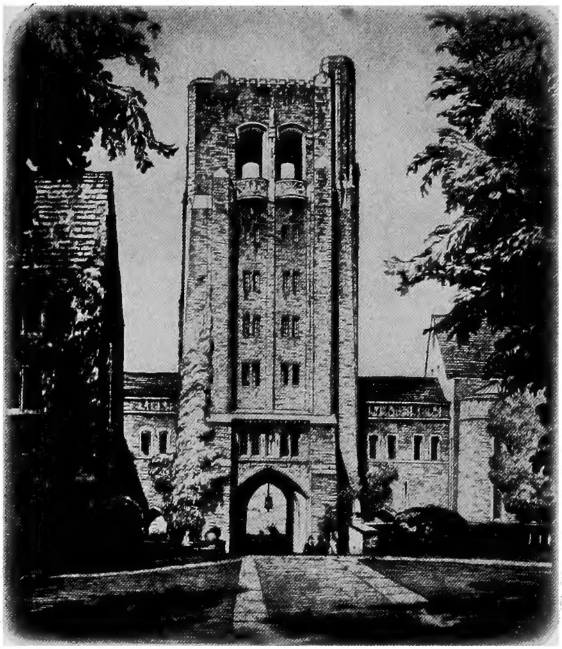
United States Tax Cases

SECOND SUPPLEMENT

KIXMILLER & BAAR



SECOND SUPPLEMENT

TO

UNITED STATES TAX CASES

ABSTRACTS OF
FEDERAL AND STATE CASES ON
INCOME TAXES, EXCESS PROFITS TAXES,
AND ESTATE, INHERITANCE, STAMP
AND MISCELLANEOUS BUSINESS TAXES

RESEARCH, ABSTRACTS AND COMPILATION BY
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FOREWORD

This book is a supplement to the original work entitled, "545 U. S. Tax Cases," published in 1921, and the supplement thereto of October 1, 1922. Its principal purpose is to bring the work down to date by the addition of abstracts of court cases since decided. Older cases which have been discovered have also been added, in the effort to make the work inclusive of every helpful federal tax case. The table of cases and index have been revised so that, as published in this volume, they cover the cases in the three volumes. The paging of this book is a continuation of the paging of the books to which it is a supplement, so that in all references to page numbers the three are treated as one volume consecutively paged.

Cases in the preceding volumes which have been affirmed, reversed or modified are so indicated in the table of cases and an abstract of the case in the higher court has been added, except where no opinion was submitted, etc. The table of cases also indicates whether a particular decision is that of the District Court or the Circuit Court of Appeals, etc.

Where reference is made to a case which has been abstracted in the preceding volumes, the page on which it appears has been given, preceded by the word "ante." Cases abstracted in this volume are referred to as "ante" or "post" without the page. The cases herein being arranged alphabetically, it will be easy to locate the reference.

Only cases deciding some point considered of general interest have been included from prohibition, oleomargarine, narcotic and tariff decisions. As the annotations in "Inheritance Tax Service," published by Commerce Clearing House, cover very fully the state inheritance tax decisions, and as those decisions are based upon the local statutes, there have been included herein only such of them as relate to some point arising under the federal estate tax statute.

The index has been made so complete as to render unnecessary a synopsis. This volume has been prepared under the editorial supervision of Charles H. Wood.

KIXMILLER & BAAR.

September 1, 1924.

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THIS BOOK IS A SECOND SUPPLEMENT TO
THE ORIGINAL VOLUME KNOWN AS 545
UNITED STATES TAX CASES AND
THE SUPPLEMENT THERETO

ACKLIN v. PEOPLE'S SAVINGS ASSOCIATION

(U. S. District Court, N. D. Ohio, W. D., August 23, 1923)
(293 Fed. 392)

Record: Revenue Act of 1921. Bill by stockholder for order to restrain defendant from filing tax returns, from paying alleged taxes, etc. Defendant's motion to dismiss denied.

Facts: Defendant is a building and loan association which lends to its members exclusively. A demand for payment of taxes has been made upon it which defendant intends to pay. Plaintiff claims irreparable damage as a result.

Questions: (1) May a member of a building and loan association who claims the association is exempt sue to restrain it from making returns and from paying tax?

(2) Is a building and loan association, membership in which entitling one to borrow may be gained by the payment of one dollar, exempt from taxation under the Revenue Act of 1921?

Decision: (1) "The right of the plaintiff in this case to maintain this suit against the association, notwithstanding the determination may not be binding upon the Government, seems clear upon the authorities, especially because of the exemption plaintiff and other members are entitled to if their association is so conducted as to be entitled to such consideration."

(2) Defendant is exempt. "The Revenue Act of 1921 provides for the exemption of domestic building and loan associations substantially all the business of which is confined to making loans to members * * *. It appears that the association is a domestic building and loan association; that it is strictly mutual in all its operations * * *. We must hold, therefore, that the Commissioner cannot deny exemption to a true building and loan association simply because it does not require each borrowing member to subscribe for an amount of stock equal to the amount of his loan. Mutuality is the essential principle of a building and loan association. The qualification of membership is a mere incident * * *. In view of the foregoing the court must hold that the People's Savings Association is exempt from taxation and that the demands

made upon it are illegal and without color or authority of law." The question of irreparable damage is reserved.

ADAMS v. UNITED STATES

(U. S. Court of Claims, October Term, 1865)

(1 Ct. Cls. 192, 306)

Record: Act of July 1, 1862. Suit to recover tax. Demurrer of Government overruled and judgment entered for plaintiff.

Facts: The Navy Department advertised for bids for clothing. Claimants submitted a bid and a guarantee that if the bid was accepted they would furnish surety for the completion of the contract. They were notified that their bid had been accepted. Afterward a written contract was executed. Claimants performed the contract and received the stipulated price. After the submission of their bid and its acceptance but before the formal contract was signed an act was passed, imposing certain manufacturers' taxes on these goods, to be paid by the manufacturer, the latter to be reimbursed by the purchaser if the contract was made before the passage of the act. Claimants sued to recover the amount of the tax paid, claiming that the articles were not subject to the tax, or, if so, that the purchaser, the Government in this case, was bound to pay it. The Government's demurrer was overruled and then it was decreed that the claimants should recover. The Government had claimed that the payment could not be recovered because it was made without protest.

Questions: (1) When was the contract completed, on acceptance of the bid or not until the formal contract was signed?

(2) Was the payment voluntary so that recovery could not be had?

Decision: (1) "We think this contract was complete on the 28th of June, 1862, when the claimant's proposals were accepted by the Navy Department. He and his sureties from that time were bound not only to furnish the articles of clothing, but to enter into the further obligations and stipulations provided for in the advertisement. If he had refused to execute the contract as prepared, or to furnish the security, he and his guarantors were liable for the

difference in cost to which the Government would have been subjected by his failure, in the shape of liquidated damages.''

''Upon the facts set forth in this petition, we think the assessment and collection of the tax upon the articles delivered under the contract were not authorized by law.''

(2) ''The evidence shows that the claimant protested against the assessment of the tax, and the assessor made return of that fact to the department. Having been assessed and certified to the collector, he was bound to collect it, and any protest would have been unavailing. The law did not require him to do that which could have been of no effect. Besides, under the regulations cited and referred to in the opinion delivered on the demurrer, he was bound to pay the tax on all goods situated as were these, and to look to the purchaser, who was the Government in this case, for reimbursement, and to whom, under the law, the tax was chargeable. Having paid it himself, he was entitled to be paid that much more for the goods—to have the sum added to the contract price.''

AGNEW, COLLECTOR, et al. v. HAYMES

(U. S. Circuit Court of Appeals, Fourth Cir., November 9, 1905)
(141 Fed. 631)

Record: Revised Statutes, Sections 970 and 989. Action for wrongful seizure of property. Defense of probable cause. On writ of error to the Circuit Court for the Western District of Virginia. The judgment for plaintiff (135 Fed. 525) was reversed.

Facts: Haymes, the plaintiff, was operating a grain distillery which was examined by officers of internal revenue, who reported to the Commissioner conditions indicating that the distillery was operated with intent to defraud the United States of the taxes upon spirits distilled therein. The Commissioner advised the collector, that in his opinion the evidence was sufficient to warrant seizure of the distillery and advised such action. Seizure of distillery followed. The seizure having been determined as unlawful, Haymes brought suit against the collector for recovery of damages resulting from the seizure of the property. Section 970, Revised Statutes, provides that no action shall be maintained against any collector who makes a seizure upon reasonable cause. Section 989 provides

that when a recovery is had in any suit against a collector and the court certifies that there was probable cause, no execution shall issue against such collector, but the amount so recovered shall be paid by the Treasury.

Questions: (1) Were the defendants liable for the seizure, either under Section 970 or under Section 989 of the Revised Statutes?

(2) Are the two sections inconsistent?

Decision: (1) The court "should have gone further and instructed the jury that the order of the Commissioner of Internal Revenue to the collector of the district directing him to make the seizure, was, in law, reasonable cause, and a protection to the defendants against damages for their action."

(2) The court held that the two sections are not inconsistent, nor does Section 989 authorize a recovery against a revenue officer for a wrongful seizure when made upon probable cause and when the goods are returned intact; their effect when construed together is to limit the claimant to damages to his property while in the custody of the officer, and to convert the judgment recovered therefor into a claim against the Government, where the officer acted upon probable cause or under directions of a superior officer.

A. G. SPALDING & BROS. v. EDWARDS, COLLECTOR

(U. S. Supreme Court, April 23, 1923)
(262 U. S. 66)

Record: Revenue Act of October 3, 1917. Suit to recover excise taxes paid under protest. Appeal from judgment by the U. S. District Court for the Southern District of New York, dismissing complaint (285 Fed. 784). Judgment reversed.

Facts: A firm in Venezuela ordered a commission merchant in New York to buy for their account and risk, a certain number of baseballs, etc. The commission merchant placed an order with the plaintiffs. The plaintiffs delivered the packages to an exporting carrier in New York, as directed by the commission merchant. The latter paid the plaintiff, but the transaction, from start to finish, was understood and intended by the plaintiff and the commission merchant to be for the purpose of exporting the goods to

the firm in Venezuela. The tax was levied upon such sale as a tax "upon all baseball bats * * * balls of all kinds * * * sold by the manufacturer, producer or importer."

Question: Was the tax laid on articles exported from the State in violation of Article 1, Section 9, of the Constitution of the United States?

Decision: "The question is whether the sale was a step in exportation, assuming, as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands. The fact that the law under which the tax was imposed was a general law, touching all sales of the class, and not aimed specially at exports, would not help the defendant in this case if the tax was 'laid on articles exported from any State,' because that is forbidden in terms by the Constitution * * * . The very act that passed the title and that would have incurred the tax, had the transaction been domestic, committed the goods to the carrier that was to take them across the sea for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter as long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. [the commission merchants], and that, theoretically, they might change their mind, and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur * * * . The act of delivering the goods to the carrier marks the point of distinction between this case and Cornell v. Coyne, 192 U. S. 418."

ALBANY CITY NATIONAL BANK v. MAHER

(U. S. Circuit Court, N. D. New York, March 27, 1881)
(6 Fed. 417)

Record: Motion for injunction to prevent proceedings for the collection from the bank of a state tax assessed against the bank's stockholders. Injunction granted.

Facts: The state statute required banks to retain so much of any dividend as necessary to pay any taxes assessed in pursuance of the act. The bank alleged that its stockholders had been assessed; that none of them had paid the tax; and that several of them had demanded their dividends and directed the bank not to pay the tax.

Question: May a bank secure an injunction against the taxing officers proceeding to collect from it a state tax which it was required to withhold from its stockholders' dividends?

Decision: The court held that the assessment was void because the assessors failed to observe a condition precedent to their right to assess and that the injunction should issue, but that the right thereto of the bank stood on a very different footing from that of the several stockholders who had been assessed. If the stockholders were complainants, the injunction would be denied because of the reluctance of the courts to interfere with the collection of taxes merely on the ground of their illegality, and because courts of equity require that it must appear not only that the tax is unlawfully imposed but that it is one which "justice and good conscience do not require the party to pay." The bank, however, was exposed to a multiplicity of suits by its stockholders. "If it pays over the dividends, the shares of many of its stockholders may be seized and exposed to sale. If complainant transfers the stock to purchasers, it does so at the peril of maintaining the legality of the sale. On the other hand, if it refuses to pay the dividends to the stockholders, and resists their suits, the burden and expense of the litigation will fall upon those stockholders who have been relieved of their assessments as well as upon the others. The case, therefore, is one where the court must intervene to prevent a multiplicity of suits."

ALBERT M. TRAVIS COMPANY v. HEINER, COLLECTOR

(U. S. District Court, W. D. Pennsylvania, April 25, 1924)
(299 Fed. 677)

Record: Sub-paragraph (1), Section 1001, Revenue Act of 1921. Action to recover special tax. Judgment for defendant.

Facts: Plaintiff, a Pennsylvania corporation of Pittsburgh, was engaged in the business of receiving farm produce on consign-

ment for sale on commission. It received such goods into its possession and advanced the freight and other charges, and sold the goods in its own name, receiving the proceeds and transmitting them to the consignor, less charges and commissions. The Act provides: "Brokers shall pay fifty dollars. Every person, whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, other securities, produce or merchandise for others, shall be regarded as a broker." Plaintiff's claim for refund was denied and it brought suit, contending that it was not a broker.

Question: Was plaintiff subject to the tax as a broker, under the 1921 Act?

Decision: "The plaintiff corporation is plainly a broker within the definition of this Act. Congress has defined in the statute a broker to be a person 'whose business it is to negotiate purchases or sales of produce or merchandise for others.' The business conducted by the plaintiff comes clearly within that definition. The statute is perfectly plain. There is no ambiguity, and therefore there is nothing for the court to construe. There is no principle of law better established than that where Congress expressly defines words, that definition must govern the courts."

The court referred to and followed Schweizer v. Mager, 297 Fed. 334 (post).

AMERICAN BREWING CO. v. UNITED STATES

(U. S. Court of Claims, April 11, 1898)
(33 Ct. Cls. 348)

Record: Act of July 24, 1897, and Section 3341, Revised Statutes. Action by plaintiff to recover $1,875, which was the 7½% discount upon stamps to brewers, which plaintiff was compelled to pay. Demurrer of defendant sustained.

Facts: Claimant on July 22, 1897, requested of the collector of internal revenue, stamps of the face value of $25,000, and at the same time tendered a certified check for $23,125, which was the face value less 7½% allowed by Section 3341 of Revised Statutes. The internal revenue collector replied: "We are temporarily out of

stamps. Leave your check and application and we will notify you when to call for the stamps.''

The check remained in the collector's hands until July 30, 1897, when same was returned to the claimant with the statement that owing to the modification of Section 3341, Revised Statutes, by Section 9 of Act of July 24, 1897, the stamps could be purchased only for their full face value.

Questions: (1) Did the tender of the check for $23,125 complete the sale of the stamps?

(2) Was the collector authorized to accept a check?

Decision: (1) There was not a complete sale. ''The transaction in law did not amount to an executed sale, for the reason that no payment was made to the agent of the defendants in exchange for the consideration of the sale.''

(2) ''The agency of the collector in the sale of stamps was a limited agency, circumscribed by the law in force at the time. * * * Persons dealing with the Government are chargeable with notice of all statutory limitations placed on the powers of public officers, and if the officer has no discretion the party dealing with him is bound by the limitation of his power as defined and circircumscribed by law. * * * The collector received the check of the claimant instead of legal tender money of the United States. He was not authorized by the terms of his employment to receive in exchange for stamps anything but such money as had the legal qualification to purchase stamps. * * * The transaction in this proceeding, being based upon an acceptance by the collector of a draft, did not bind the defendants as consummating a sale of stamps.''

AMERICAN-LA FRANCE FIRE ENGINE CO., INC., v. RIORDAN, COLLECTOR

(U. S. District Court, W. D. New York, November 7, 1923)
(294 Fed. 567)

Record: Revenue Acts of 1917 and 1918. Suit to recover excise taxes. Bill dismissed.

Facts: Plaintiff asks the refund of certain manufacturers' sales taxes paid in 1918 and 1919 on automobile trucks to which

fire extinguishing appliances were for the most part permanently attached by plaintiff.

Questions: (1) Was the plaintiff liable to the manufacturers' sale tax on the fire trucks sold?

(2) Is this liability affected by the fact that the purchaser is a municipality which is exempt from taxation?

(3) How should a taxing statute be construed?

Decision: (1) The uncertainty and indefiniteness of former rulings were "laid at rest on July 22, 1919, by the promulgation of a revised regulation that motor fire engines and motor fire-fighting apparatus, hose carts, hook and ladder trucks, water tower trucks, etc., were subject to taxation as automobile trucks and automobile wagons, regardless of sales to municipalities."

The fact that there was an earlier ruling of the Commissioner that the tax did not apply was held not to preclude the United States from the right to impose and collect the tax on subsequent modification of the earlier rule. In this case, the Department did not assess the tax, but monthly returns were required and the tax apparently became self-executing.

The characteristics of an automobile vehicle are not materially altered by fixing to the chassis or frame "devices or machinery of one kind or another that may make or tend to make the completed vehicle useful for a special purpose. It makes no difference that the chassis is specially designed or enlarged, or made adaptable for riveting pumps, retaining hooks for ladders and axes, the fire extinguisher, and running board for use of the firemen, or that the motors are constructed for greater speed than automobiles or other self-propelled vehicles. * * * I think Congress, in fixing the excise taxes applicable to self-propelled vehicles, used the terms 'automobile,' 'automobile wagon,' and 'automobile truck' in a broader sense and intended to include all power vehicles generally that were ordinarily used for transportation on streets and roads."

(2) The court further held that sales which were made to municipalities were not exempt from the tax, since the tax was imposed on the plaintiff for the privilege of selling and dealing in the

manufactured articles, and was not a direct tax on the municipalities.

(3) "It is a uniform rule of interpretation of tax-levying statutes not to extend their provisions by implication or to enlarge their scope, with a view of including matters or articles not specifically mentioned, and in case of doubt they are construed against the Government and in favor of the citizen. * * * But * * * a doubt as to the meaning of a statute must be one which remains after all recognized rules for ascertaining its meaning have been tried, and such a doubt is often removed by consideration of the legislative intent as appearing by the entire statute. A narrow meaning of a word is rarely given a revenue statute, and the adjudications uniformly hold that words of general description often embrace an unnamed article, or one that was not thought of by the enacting power at the time the act was passed.

AMERICAN LAUNDRY MACHINERY COMPANY v. DEAN, COLLECTOR

PROCTOR & GAMBLE COMPANY v. DEAN, COLLECTOR

(U. S. District Court, S. D. Ohio, W. D., July 24, 1923)
(292 Fed. 620)

Record: Revenue Acts of 1918 and 1921. Suit for recovery of stamp taxes paid under protest. Demurrers of the defendant overruled.

Facts: Plaintiff corporations reduced the par value of their shares of stock from $100 to $20 and issued new certificates for five shares of $20 par value each in lieu of certificates outstanding for one share of par value of $100 each. The collector claimed that under Section 1100, Schedule A, par. 2 of the Revenue Act of 1921, and section 1100, Schedule A, par. 3 of the Revenue Act of 1918, stamps should have been attached to the new certificates because the sections provided that there shall be "levied, collected and paid, for and in respect of * * * certificates of stock * * * or for or in respect of the vellum, parchment, or paper upon which such instruments * * * are written or printed * * * the several taxes specified in such schedule," and the statutes further pro-

vided for the above-mentioned stamp tax, "on each original issue, whether on organization or reorganization, of certificates of stock * * * by any corporation, on each $100 of face value or fraction thereof, 5 cents."

Question: Do the provisions of the law above set forth apply to certificates of stock which are issued to take the place of outstanding certificates, and which differ from the old certificates only in the fact that the par value of each share of stock is reduced from $100 to $20?

Decision: "The provisions of the law are not applicable to all certificates of stock, but by their express terms pertain only to certificates of 'original issue.' The question is not whether the certificates themselves are original, but whether the issue is original. * * * An original issue of capital involves the idea of a change in the amount or kind of stock outstanding. Capital stock of corporations may be divided into several well-known classes. We thus find, among the recognized corporate issues, common stock, preferred stock of various classes, issues, and priorities, and the more recent and somewhat unique no par value stock. We are not at this time prepared to say that a change from par value common stock to no par value common stock would not constitute a change in the kind of capital stock outstanding just as much as a change of common stock to a preferred stock, and vice versa, would constitute such change in kind, but we are firmly of the opinion that no original issue of stock can exist without either a change in the amount of such stock outstanding or in the kind or character of such stock."

"In the present case, however, there is no change in the par value of the common stock outstanding after the exchange and before. Nor is there any change in the rights and privileges either in sharing in the earnings or participating in the management, as to any stockholder before and after he has exchanged his stock. The right to cast five votes, where the stockholder previously had the right to cast but one, in no way changes the proportionate voting power of the stockholder or his proportionate interest in the assets and earnings of the corporation. We are clearly of the opinion that before any issue of capital stock can be designated an 'original issue'

some stock must pass from the treasury of the corporation into the hands of a stockholder which either differs as to kind, class, or privileges from stock which had theretofore been outstanding, or which increases the aggregate par value of some previously outstanding class of stock. The change of kind, class, or privileges referred to must be a change in substance and in fact, and not a mere change in name or form."

AMERICAN PIG IRON STORAGE CO. v. STATE BOARD

(Supreme Court of New Jersey, February Term, 1894)
(56 N. J. L. 389)

Record: Act of New Jersey of April 18, 1884, as amended. A franchise tax on the corporation was levied. This was questioned but the Supreme Court decided that the levy was lawfully made and should be confirmed.

Facts: A franchise tax was assessed for the year 1893 upon a capital of $1,500,000, the statute directing the taxing of "capital stock issued and outstanding." The company was organized for the amount stated. All the stock had been subscribed, but assessments on these subscriptions amounting to 10 per cent only had been made. The corporation had elected officers and proceeded with business. Because the stock subscribed had not been paid in full, it was contended that the stock was not taxable as "capital stock issued and outstanding."

Question: Is capital stock subscribed for "capital stock issued and outstanding"?

Decision: Throughout the act of the state legislature, persons who have become subscribers for stock are regarded as stockholders. In elections the vote is according to the number of shares of stock held, and a director must be a bona fide holder of stock. The act contemplates that the corporations may organize, elect officers and transact business where all the stock has not been paid in provided not less than $1,000 be paid in. A certificate of stock is not necessary to consummate the ownership of the share of stock subscribed for. "In a popular sense, a corporation engaged in organization is said to issue stock when it obtains subscriptions for it, and in

the consideration of tax laws words are to be interpreted in their popular sense.'' This company was engaged in business and was ''in the exercise of those franchises for the privilege and right to exercise which the franchise tax and license fees assessed were imposed. If actual exercise and enjoyment of the franchises derived from the incorporation be necessary to entitle the state to exact the tax and license fee therefor (which I am unwilling at this time to concede), that condition appears in this case.''

APPEAL OF BOLTE AND CARTER

(Hawaii Supreme Court, February 1, 1907)
(18 Haw. 241)

Record: Appeal from decision of treasurer assessing a stamp duty on an instrument as a mortgage. Decision reversed and stamp duty fixed at $1.00, the paper being held merely an agreement.

Facts: September 7, 1901, Bolte and Carter were made trustees under a mortgage to secure certain bonds aggregating $140,000. A stamp duty of $409 was paid. In 1904 the principal sum of $20,000 not having been paid when due, further security was given in another instrument upon which a stamp duty of $1.00 was paid. In 1906 another instrument was executed referring to the others and extending the time of payment to 1916 as to the then unpaid balance of $110,000, reducing the rate of interest, providing for new interest coupons, for the trustees to take possession of the property, for a sinking fund, etc. The treasurer assessed a stamp duty of $319 on this last mentioned instrument, on the theory that it was a mortgage. The trustee, contending that the duty should be only $1.00 on the theory that the instrument was merely an agreement, appealed from the decision of the treasurer.

Question: Was the instrument last named subject to the stamp tax as a mortgage or as an agreement?

Decision: ''The decision of the treasurer cannot be sustained. A mortgage is a conveyance of property as security. In this case the mortgage was already in existence and stamp duty had been

paid upon it. The instrument in question was not a mortgage. It conveyed no property. It was merely an agreement reducing the interest on and extending the time of payment of the debt secured by the mortgage already made in consideration of the mortgagor's agreement after default that the trustees should take possession and manage the property for the benefit of all concerned."

ARMOUR et al. v. ROBERTS, COLLECTOR

(U. S. Circuit Court, W. D. Missouri, W. D., March 9, 1907)
(151 Fed. 846)

Record: Act of June 13, 1898, imposing legacy taxes. Suit to recover such taxes paid under protest. The demurrer interposed by the defendant was overruled.

Facts: By his will, Armour left property to his widow and to trustees for his children until they arrived at majority. The tax was levied on the shares of the children, which was paid under protest, and suit was brought against the successor in office of the collector to whom payment was made. The petition stated these facts and alleged that none of the legacies taxed had vested; that none of them was capable of being immediately possessed or enjoyed, and that none could vest until the legatee attained majority. Defendant demurred.

Question: Was a cause of action stated against the successor in office?

Decision: The Government's argument was that, conceding the tax ought to be returned, there is no legal way to do so, and certain of the objections were that the collection was not a tort; that there was no contract for the return of the money; and that the successor in office was not liable to be sued in any event. The court said that the collection was not a tort but that there was an implied promise to return the amount if illegally collected; that the collector acted in good faith but mistakenly; that in such cases suit could be brought against the original collector or his successor and that it was the duty of the Commissioner to pay any judgment obtained against the collector.

ATLANTIC COAST LINE RAILROAD COMPANY v. DAUGHTON et al.
NORFOLK SOUTHERN RAILROAD COMPANY v. DAUGHTON et al.
SEABOARD AIR LINE RY. CO. v. DAUGHTON et al.
SOUTHERN RAILWAY COMPANY v. DAUGHTON et al.

(U. S. Supreme Court, June 4, 1923)
(262 U. S. 413)

Record: North Carolina Income Tax Act of March 8, 1921. Bills to enjoin enforcement of the tax against plaintiffs were dismissed by the U. S. District Court for the Eastern District of North Carolina. Appeals to U. S. Supreme Court. Affirmed.

Facts: The Income Tax Act divided the taxpayers into three classes—individuals, ordinary corporations and public service corporations (including railroads). The statute, in terms, taxes only net income. For railroads required to keep accounts according to the method established by the Interstate Commerce Commission, it made those accounts the basis for determining "net operating income," and it directed that in order to ascertain the "net income" there should be deducted from the net operating income (a) uncollectible revenue; (b) taxes for the income year, other than income taxes, and war profits and excess profits taxes; (c) amounts paid for car hire.

Questions: (1) Is the statute unconstitutional, because it fails to include among the deductions from income allowed public service corporations the capital charges, including other rentals paid, being a tax on net income from property in the state and not on net income of the owner?

(2) Does the statute violate the commerce clause?

(3) Does the statute violate the equal protection clause of the 14th Amendment?

(4) Does the statute violate the State constitution?

Decision: (1) "That a State may, consistently with the Federal constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in

Shaffer v. Carter, 252 U. S. 37 [ante 448] * * *. It is a common provision in State income tax laws to tax the net income of property within the State which is owned, or operated, by nonresidents. The differences between the parties arise, in the main, not from difference in the method of determining what is net income, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained.

(2) "Under the commerce clause it is essential that a State tax shall not directly burden interstate commerce and that it shall not discriminate against interstate commerce. With these essentials the North Carolina Act complies. It is not assessed on gross receipts. * * * It does not discriminate against interstate commerce. For the taxable net income of other public service corporations which are wholly intrastate is determined also without allowing capital charges as a deduction.

(3) "The contention that the statute is obnoxious to the equal protection clause rests upon the argument that the State's definition of net income of public service corporations (including railroads) is arbitrary. It is alleged to be arbitrary because it allows to other corporations and to individuals certain deductions which are denied to public service corporations; namely, interest on funded debt, rentals, and certain worthless debts. That the differentiation results from the difference in the subject of the tax, and, hence, is not arbitrary, has been pointed out above. But, in any event, the differentiation would not render the statute unconstitutional. The State might, consistently with the equal protection clause, have subjected only public service corporations to the income tax, or it might have laid upon them a higher income tax than upon others; as it laid upon railroads a higher franchise tax than it did upon other corporations."

(4) "The claim that the statute violates the State constitution rests mainly on the contention that the tax is not upon the net income. As shown above, the assumption is erroneous. Only the net income of the property operated as a utility is taxed. There is nothing in the constitution of the State which precludes taxing the

net income of the property so operated, as distinguished from the net income of the company.''

AVERILL v. SMITH

(U. S. Supreme Court, December, 1872)
(17 Wall. 82)

Record: Act of February 24, 1807. Action in trespass against a collector of internal revenue for taking and carrying away certain barrels of whiskey. Judgment of Circuit Court for plaintiff reversed.

Facts: Plaintiff claimed certain whiskey that was seized by the defendant, and in the action for the forfeiture of the whiskey for fraud of the internal revenue laws, secured a judgment in his favor. He then brought this action in trespass against the collector.

Question: Was the collector liable in an action of trespass for damages for seizure of the property, or for failure to return the property?

Decision: ''Attempt to sell such property to avoid the payment of the internal revenue duties imposed thereon is a legal cause of forfeiture, and if the defendant, as such collector had good cause to believe and did believe that the property described in the information was forfeited to the United States by any such attempt of the owner, it was his duty to make the seizure, and inasmuch as the District Court, having jurisdiction of the subject-matter, have adjudged and certified that there was probable cause for the seizure, the court is of the opinion that trespass will not lie for that act.''

The court further held that the failure of the defendant to return the property did not make him a trespasser *ab initio,* since the plaintiff in the forfeiture proceedings had not moved the court for the necessary orders to cause the property to be returned.

BALTIMORE & OHIO R. R. CO. v. UNITED STATES

(U. S. Supreme Court, January 2, 1923)
(260 U. S. 565)

Record: Stamp Tax Act of October 22, 1914; Act of May 12, 1900, as amended, and Section 3226, Revised Statutes. Suit for

recovery of stamp taxes. Appeal from the judgment of the Court of Claims sustaining a demurrer of the Government. (56 Ct. Cls. 279, ante 843.) Affirmed.

Facts: Action brought in the Court of Claims to recover over $55,000, alleged to have been illegally exacted as stamp taxes upon deeds of conveyance, which were without valuable consideration. Before the delivery of the deeds, they were exhibited to the Commissioner and a ruling asked, thereby making what it is alleged was a claim in abatement. He ruled that the Stamp Tax Act of October 22, 1914, applied and the company, without protest, affixed the stamps. Later, the Commissioner, in construing a similar provision in the Act of 1918, held that no stamps were required where no valuable consideration passed. Claim for refund was filed, which was rejected because barred by the statute of limitations. Claimant now alleges that its claim for refund constituted an amendment of its original so-called claim in abatement.

Question: Did the claim for a refund constitute an amendment to the so-called claim in abatement, so that the claim was filed within two years after the stamps were affixed?

Decision: "The preliminary request to the Commissioner for an informal ruling was in no sense a claim for abatement or refund. Appellant affixed the stamps to the deeds without protest and after that no effort was made to secure redemption of, or allowance for the stamps until long after the two-year period had expired."

BALTZELL v. CASEY, AND FIVE OTHER CASES

(U. S. District Court, D. Massachusetts, August 16, 1924)
(Not yet reported)

Record. Revenue Act of 1918. Suits for the recovery of income taxes paid. Judgments for defendants.

Facts: Each of the plaintiffs had a life interest in the income of a trust fund. In the cases of Baltzell and Davis the Supreme Judicial Court of Massachusetts had held that they had also a vested equitable remainder in the fund itself. The trustees paid over to the plaintiffs the entire probate income of the trusts. Against these payments the plaintiffs claimed credit on their income taxes for their proportional shares of the capital losses

sustained; the claims were denied in toto by the Department; and proper steps were taken to bring the question into court.

Question: May a beneficiary of a trust deduct from his income received, losses incurred by the trust estate?

Decision: The act provides that "Gains, profits and income derived from any source whatever," are taxable. The statute provides that "The net income of the estate or trust shall be computed in the same manner and on the same basis" as in the case of an individual. "Each beneficiary's distributive share of such net income" is required to be stated by the fiduciary. The tax imposed on income retained by the fiduciary for unascertained persons and for accumulation, is to be paid by the fiduciary. Where income is distributed by the trustee (as here), "the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of the beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year." The regulations made pursuant to the statute say, "In the case of certain estates and trusts it is recognized that the estate or trust cannot be treated as a unit for income tax purposes," etc.

The regulations provide that "losses of principal may be credited by the trustees against undistributable income and gains. As gains on principal would but rarely be distributable, the trustee would generally be taxable in respect to them; and it is plainly right that he be allowed to credit losses on principal. * * * Where the trustee has no undistributable income the regulation makes it impossible for a trust estate to offset such losses against income—though it may still do so against gains in principal. * * *

"The real question is whether this regulation is consistent with the statute. In spite of the objections urged against it, it seems to me a reasonably fair way to deal with the situation. There is no good reason why the beneficiaries should profit on their income taxes because of losses of principal with which, except as reflected in income, they are not concerned. There is no legal identity between a trustee and a cestui que trust, nor any general

principle under which losses sustained by one should be available to the other in the manner here claimed. The difficulty is with the language of the statute, which says in so many words that "there shall be included in computing the net income of each beneficiary his distributive share * * * of the net income of the estate or trust for the taxable year. * * * "Certainly no fiat of the Federal Government can change the basic rights inter se of the beneficiary and trustee; it cannot entitle the former to accretions of principal nor make him chargeable with losses of principal. This is so clear that Congress must have had it in mind when the Act was framed. It is not reasonable to suppose the Act to mean that the beneficiary's share of the net income of the trust estate is, for purposes of taxation, to include gains in capital when those exceed losses, and that he is to be taxed on something which he cannot and will not receive. Neither party puts such a construction upon the Act. * * * Both read into the statute to some extent the terms of the trust. Once that is done, it is a short and almost inescapable step to say that "distributive share" means distributive under the trust, and that the beneficiary's "distributive share of the net income of the estate or trust" on which he is to be taxed is what he is entitled to receive under the terms of the will or instrument of trust, and not the sum which is regarded as income under the statute for very different purposes."

BANK OF COMMERCE et al. v. STATE OF TENNESSEE et al.

(U. S. Supreme Court, March 2, 1896, and May 25, 1896)
(161 U. S. 134 and 163 U. S. 416)

Record: State charter to a bank; state tax laws, and section 10, article 1, Constitution of the United States. Bills were filed by the state against the bank and Omberg for certain taxes. Demurrers were interposed. Decrees for defendants were reversed by the state Supreme Court (31 S. W. 993) and the defendants took the cases to the Supreme Court of the United States by writ of error to review this decision. Reversed in part and remanded. Later, the judgments of the state Supreme Court were reviewed on another writ of error, on a petition for a rehearing of

questions theretofore decided. The United States Supreme Court's mandate was recalled and modified.

Facts: The bill against the bank alleged its incorporation in 1856. Its charter provided: "Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the state for taxes; and shall pay to the state an annual tax of one-half of one per cent on each share of capital stock, which shall be in lieu of all other taxes."

The bill alleged that notwithstanding this provision there had been assessed against the stock certain taxes by virtue of the general tax laws of the state, and it claimed an ad valorem tax on the surplus and undivided profits under the state Act of 1891 providing that "the surplus and undivided profits in such bank * * * shall be assessable to said bank * * * and the same shall not be considered in the assessment of the stock therein." A further claim was that the language "in lieu of all other taxes" referred to other taxes on the shares of stock and had no effect to exempt the capital stock of the corporation. The bill was framed in the alternative, however, claming that either the corporation was liable to this new tax or the stockholders were. It was also set forth that after the adoption of a new state constitution in 1870, the capital of the bank had been increased, and the claim was made that the new stock was taxable.

Defendants demurred, raising the question that the state laws were violative of the contract provision of the U. S. Constitution. The trial court, after a hearing on the pleadings and a stipulation, considered the demurrer well taken and dismissed the bill. The state Supreme Court reversed this decree, holding that the shareholders were liable for the tax, and that the bank was liable only for the ad valorem tax on its surplus and undivided profits.

Later, another writ of error was sued out to review a judgment of the state Supreme Court as to the exemption from taxation of the so-called new stock of the bank, being stock issued since the adoption of the Constitution of 1870. At the time of such adoption, the capital stock was $200,000. The charter of the bank provided that "it may receive on deposit any and all sums not less than $1 per week offered as stock deposits; * * *

and when such deposits amount to $50 it may, at the option of the depositor, become stock in the institution.''

The new constitution provided for the taxation of all property, which would include the shares thereafter issued unless prevented by the exemption clause in the charter.

Questions: (1) Were the stockholders protected from further taxation by the charter provision?

(2) Was the bank protected by this charter provision against a state tax as to its surplus and undivided profits?

(3) Were the persons who became stockholders after the adoption of the new constitution protected by a contract contained in the bank's charter?

Decision: (1) The state argued that the decision in Farrington v. State of Tennessee, 95 U. S. 679, that the charter provision constituted a contract against a further taxation of the stockholders, was based upon consideration of an incomplete quotation from the charter, but it was held that as the court in that case had before it the whole charter of the bank, ''we are not prepared to say that its force was misunderstood, or that there was an omission by the court to consider all the language of the exemption clause simply because a portion of it is omitted in the quotation from the record made in the opinion there delivered. * * * We must now hold that the charter clause of exemption limits the amount of tax on each share of stock in the hands of the shareholder, and that any subsequent revenue law of the state which imposes an additional tax on such shares in the hands of the shareholders impairs the obligation of the contract and is void.''

(2) ''Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; no implication will be indulged in for the pur-

pose of construing the language used as giving the claim for exemption where such claim is not founded upon the plain and clearly expressed intention of the taxing power.''

The court said that surplus belonging to the bank was corporate property distinct from its capital stock and the exemption did not apply thereto.'' The very name of surplus implies a difference. There is a capital stock and there is a surplus over, above, and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders.'' The statute ''under which the surplus is taxed provides that such surplus must not be considered in the assessment upon the stock; so that provision is made whereby a tax upon the surplus and the charter tax upon the shares of stock will neither be double nor unjust taxation.''

(3) On the second writ of error, the United States Supreme Court said it had fallen into error as to the decision of the state court on the taxation of the stockholders, such error consisting in mistaking a certain statement in the opinion of the court below for the judgment which it actually rendered. Instead of granting the exemption, the state court had refused it. The statement was that, in the opinion of the court, no difference existed between the holders of the old and the holders of the new stock, but the judgment of the court was that all stockholders were subject to the tax.

No limit was placed on the amount of the capital stock of the bank, and the provision for increase through depositors becoming stockholders left the decision with the depositors. ''By this provision it cannot be claimed that the state entered into such a contract with future depositors who might choose to demand stock for their deposits, that the provision relating thereto could not be changed by the legislature. It was a provision in relation to one of the general powers of the corporation to issue stock which might be changed from time to time as the legislature in its discretion might think proper so long as no vested right of property accruing prior to the legislative amendment was unfavorably affected thereby. We think there was no vested right on the part of the future depositor to make a stock deposit, and claim the

issuing of a similar amount of stock to him, which a legislature could not cut off. If before making any such deposit the legislature altered that provision in the charter and prohibited any such kind of deposit thereafter, we think it clear that no vested right of a future depositor was thereby interferred with. * * * By the enactment of the charter there was no contract therein to forever continue this power to deposit and make such deposits a claim for stock therefor. There is no such language in terms, and none should be implied. It amounted to nothing more than a legislative license, which might be availed of by any depositor, but which the legislature might at any time revoke by thereafter prohibiting the issuing of stock in return for deposits. If the legislature could thus absolutely prohibit the further issuing of stock, could it not also provide that no stock should be thereafter issued unless subject to taxation as other property in the state? We see no reason to doubt the legislative capacity in that respect. Of course, the adoption of a constitutional provision of the same nature would be subject to the same rule. * * * The Constitution impaired no obligation of an existing contract. It prevented the subsequent making of one."

Reference was had to Pearsall v. Great Northern R. Co., 161 U. S. 646, as basis for the holding that "all provisions in a charter granting rights or powers to a corporation do not partake of the nature of a contract, which cannot for that reason be in any respects altered or the power recalled by subsequent legislation. Where no act is done under the provision and no vested right is acquired prior to the time when it was repealed, the provision may be validly recalled, without thereby impairing the obligation of the contract."

So much of the judgments as was against the shareholders was reversed and the cases remanded. On the second writ of error the original mandate was recalled and so much of the judgment of the state court as permitted a recovery against the holders of the old shares of stock was reversed, while the judgment so far as it permitted a recovery for taxes assessed against the holders of the new shares was affirmed, and the cases were remanded for further proceedings.

BANKERS MUTUAL CASUALTY CO. v. FIRST NATIONAL BANK

(Supreme Court of Iowa, September 24, 1906)
(131 Ia. 456)

Record: Action for a balance on a note given as premium on an insurance policy. Demurrer. Judgment for defendant. Reversed on appeal.

Facts: Plaintiff issued its policy to defendant and took a note for $300, payable in installments when assessments were made. Defendant paid the assessments as they were made until the last, which it refused to pay, claiming the note was without consideration because plaintiff had no authority to issue the policy. The insurance was against burglary and the statute under which the plaintiff was organized authorized the formation of corporations to insure against "loss by fire or other casualty."

Question: What is the meaning of the word "casualty"?

Decision: "'Casualty' and 'Casualty insurance' are words of quite frequent use, yet it cannot be said that their definition has been very accurately settled by the courts. Strictly and literally 'casualty' is perhaps to be limited to injuries which arise solely from accident without any element of conscious human design or intentional human agency; or as it is sometimes expressed, inevitable accident, something not to be foreseen or guarded against. Standard Dictionary. But in ordinary usage, 'casualty,' like 'accident,' is quite commonly applied to losses and injuries which happen suddenly, unexpectedly, not in the usual course of events, and without any design on the part of the person suffering from the injury. Nor does the fact that the conscious or intended act of some other person produces it take from such injury its character as an accident or casualty."

The court referred to the case of State ex rel. v. Investment Co. (Minn.), 50 N. W. 1028, which involved personal injuries, and said that the definition of "casualty" applicable under the particular statute was rather such as is defined in Employers Life Insurance Corporation v. Merrill (Mass.), 29 N. E. 529, which classed as casualty companies those insuring against the explosion of steam

boilers and the breaking of plate glass. "A casualty by which a loss of property is occasioned is not necessarily restricted to a conflagration by which the property is consumed, and we can see no reason why, in the absence of other restrictive provisions in the statute, it may not as well include lightning, tornado, flood, hail, or other forces or violations by which such property is injured, destroyed or lost without the agency or design of the owner."

The court held the statute, under the construction thereof by the constituted officers, etc., to authorize the issuance of burglary insurance.

BANKERS' TRUST CO. et al. v. BLODGETT

(U. S. Supreme Court, January 22, 1923)
(260 U. S. 647)

Record: Connecticut statute of 1915. Proceedings in the state court for the abatement of a tax on the estate of a deceased person. Dismissed by direction of the State Supreme Court (96 Conn. 361, ante 849). Writ of error. Affirmed.

Facts: The statute provided that all taxable property of any estate upon which no town or city tax has been assessed or upon which no tax has been paid the state during the year preceding the date of the death of the decedent, shall be liable to a tax of 2 per centum per annum on the appraised inventory value of such property for the five years next preceding the date of death, provided that the administrator, etc., might furnish evidence that such a tax had been paid for a portion of said five years or that the ownership thereof had not been in the decedent, and obtain a proportionate deduction. It was further provided that a person aggrieved might appeal to the superior court.

Lena McMullen died in 1919, and the Tax Commissioner filed a statement that there was due from the estate taxes of over $10,000. Plaintiffs in error appealed to the superior court. A demurrer was interposed and the proceedings were dismissed. Plaintiffs in error contended that the statute imposing the tax was unconstitutional as violating the 14th amendment to the U. S. Constitution and that the statute (as stated by the State Supreme

Court) deprived "creditors and distributees of this estate of their property without due process of law (a) by exacting a penalty from them for the failure of the decedent to list his property for taxation, and, (b) by creating against them a presumption of guilt for such omission."

Question: Was the statute unconstitutional?

Decision: "The comment of the [state] court upon the specifications was that both 'rest on the unfounded premise that the property of this estate, upon the decease of the owner, passed to the distributees, subject to the payment of the just debts of the estate.' And the court further said: 'The right to dispose of one's property by will, and the right to have it disposed of by the law, after decease, is created by statute, and therefore the state may impose such conditions upon the exercise of this right as it may determine.' "

There was an evasion of duty by decedent, and the obligation she incurred and should have discharged was imposed upon her estate, and legally imposed; for out of her estate it can only be discharged. The payment of taxes is an obvious and insistent duty, and its sanction is usually punitive. The Connecticut statute is not, therefore, in its penal effects, unique, nor are they out of relation or proportion to a decedent's delinquency."

The provision of the statute was "but a way of fixing a penalty for the delinquency, which it is competent for the state to do."

Referring to the contention that the statute was an ex post facto law, the court said: "The penalty of the statute was not in punishment of a crime, and it is only to such that the constitutional prohibition applies. It has no relation to retrospective legislation of any other description."

"The power of taxation, with its accessorial sanctions, is a power of government, and all property is subject to it. And it is a proper exercise of it to satisfy out of his estate the delinquency of a property owner. It is so complete that it does not need the assumption of universal ownership by the state to justify it."

BANKERS' TRUST CO et al. v. BOWERS, COLLECTOR
(U. S. Circuit Court of Appeals, Second Cir., December 10, 1923)
(295 Fed. 89)

Record: Revenue Act of 1921, Section 226 (c). Suit to recover income taxes paid under protest. Decision of District Court (292 Fed. 793), granting motion to dismiss, reversed.

Facts: The executors filed two returns, one reporting income of deceased for the calendar year up to the time of his death, and the other reporting income received by the estate during the same calendar year. They paid, under protest, taxes in both cases, computed on the basis of returns made for a portion of a calendar year, and sued to recover that portion of the tax added by placing the income on an annual basis. The District Court granted a motion of the collector to dismiss, on the ground that the complaint did not show a cause of action.

Question: When a taxpayer dies before the end of his taxable year (a calendar year in this case) should the income he had received up to the time of his death, and the income received by his estate in that taxable year, be placed on an annual basis, in computing the tax on these two entities?

Decision: Section 226 (c) "provides solely for the placing of income on an annual basis and for computation of the tax thereon in the case of a return for a period of less than one year where the change is made voluntarily by the taxpayer or pursuant to an order of the Commissioner."

"The time of receipt of income or the ability to receive income has no bearing upon the accounting period. A taxpayer may receive his income for the year on the first day of the year. He may become a nonresident alien during the year without property in or income from any source in the United States. As an alien, he may have come to this country during the first taxable year and he may have attained his majority or become incompetent during the year. When during the year his status changes and he becomes a taxpayer, or ceases to be one, is immaterial. If he received taxable income during any part of that year and kept his books on a calendar year basis, a return is required of all such income derived

from or received within the twelve months of such calendar year and the return is for a period of twelve months. Here the plaintiffs reported all the taxable income received by the decedent during the calendar year of 1921. And in their return, they reported all the taxable income received by the estate of the decedent during the same calendar year 1921. The estate and deceased were separate entities, each having a separate accounting.''

Section 216 (f) provides that the credits shall be determined by the taxpayer's status on the last day of the taxable period, ''but in the case of an individual, who dies during the taxable year, such credits shall be determined by his status at the time of his death.'' ''This section indicates that it was not the intention of Congress that the date of death be the last day of the period for which the decedent's return is filed.''

''The returns required under subdivision (a) are returns for a period of less than one year, and it is clear from the context that subdivision (c) was intended to apply to such returns alone. There was nothing in subdivision (c) which would indicate a purpose to create a new and extensive class of returns such as those in the instant case, for a period of less than one year.''

As indicating the purpose of Section 226 (c) the court quotes from the report of the House Committee on Ways and Means:

''Under existing law the taxpayer may improperly reduce his surtax by changing his fiscal year, thus splitting his annual income into two parts. This section proposes to prevent such evasion by providing that in the case of a return for a period of less than one year the net income shall be placed on an annual basis and the surtax properly computed thereon in accordance with the number of months in such period.''

The court said that the statute provided for the taxing of actual and not constructive or hypothetical income; that section 226 (a) made no provision in terms for a fractional part of a month, and that the whole section should be construed together.

The complaint sufficiently alleged a cause of action and the judgment of the lower court was reversed.

BASHARA v. HOPKINS, COLLECTOR

(U. S. Circuit Court of Appeals, Fifth Cir., December 6, 1923. Rehearing denied January 31, 1924)
(295 Fed. 319)

Record: Section 250, Revenue Act of 1921, and Section 3224, Revised Statutes. Bill to enjoin the collection of taxes by distraint. Injunction was denied and the bill dismissed (290 Fed. 592). Complainant appealed. Affirmed. (Certiorari denied by the Supreme Court, May 5, 1924.)

Facts: Plaintiff paid an income tax of $6,904.81, for the year 1917. In 1923 he was notified that his assessment had been increased $2,522.64. After receiving a second demand for the additional taxes, plaintiff filed a bill for an injunction alleging that the statute of limitations provided by Section 250 of the Revenue Act of 1921, which prohibited the collector from bringing any suit or proceeding for collection of a tax after five years from the time the return was filed, made it illegal for the collector to seize or attempt to distrain plaintiff's property in order to collect the said additional tax.

Question: Was the plaintiff entitled to an injunction in spite of the fact that Section 3224 of the Revised Statutes provided that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court"?

Decision: The court referred to the fact that there was no allegation that the assessment was incorrect; that it appeared appellant was amply able to pay the amount sought to be collected; that it was of the opinion he had an adequate remedy at law in that he might pay and sue for the return of the money; that as April 1, 1923, fell on Sunday and the assessment was in the hands of the collector in Texas on Monday, it must have been signed by the Commissioner before the first of the month; and that, therefore, it appeared that the assessment was made within the statutory period of five years from the date of appellant's return, which was filed April 1, 1918.

"The bill is sought to be maintained upon the theory that, under section 250 (d) of the Revenue Act of 1921, any proceeding

for the collection of taxes for the year 1917 is barred, because five years had elapsed since the appellant filed his return, and that Revised Statutes Section 3224, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," is inapplicable. The Supreme Court has ruled directly against this position in Graham v. DuPont, 262 U. S. 234 (post). In that case the assessment was made after the expiration of the statutory period, but it was held nevertheless that injunction would not lie, because of Section 3224. It is true in this case, as it was in the cited case, that under the Act of March 4, 1923 (42 Stat. 1504), the complainant has two years after payment of the tax to bring suit to recover it back, in which suit he can raise any question affecting the validity of the assessment.

"The order of the District Court is affirmed."

(In the decision in the District Court, several cases were cited referring to the difference between a limitation in a special act, destroying the right, and a general statute of limitation, destroying the remedy only.)

BEAM v. HAMILTON, COLLECTOR

(U. S. Circuit Court of Appeals, Sixth Cir., May 15, 1923)
(289 Fed. 9)

Record: Revenue Act of October 3, 1917. Suit for the recovery of a penalty. In error to U. S. District Court, Western District, Kentucky, which rendered judgment for the defendant. Judgment affirmed.

Facts: During the year 1917, plaintiff was general manager of a distillery, for which he received a salary, and was also an owner of shares of stock in the company, from which he received dividends. He was also, on his own account, engaged in the business of registered distiller and wholesale and retail liquor dealer, and, as such distiller, owned and operated that individual business. He made an income tax return showing the salary and dividends referred to above, but made no return of his income from his personal business as distiller and liquor dealer. A return of the income from his personal business would have made him liable to an additional income tax of $4,333.18, and to an excess profits tax of $21,155.47. On dis-

covering this situation, the Commissioner made a new assessment of taxes on the correct basis, adding a penalty of 100 per cent for making a false and fraudulent return and a penalty of 50 per cent upon the excess profits taxes for failure to make and file an excess profits return.

The District Court held that the return was not false and fraudulent, it appearing to have been prepared by an expert accountant, the accountant having full data for the return and the plaintiff claiming that he had executed the same without "looking at it or noting the amount thereof." The District Court held, however, that the plaintiff was not entitled to recover the 50 per cent penalty assessed for failure to make an excess profits return, although the form of return for the income tax had a provision for showing the amount of excess profits tax, which was left blank by the plaintiff, and although the plaintiff voluntarily gave to the collector information which enabled him to make an assessment of the excess profits tax.

Question: Was the plaintiff liable for the 50 per cent penalty?

Decision: Revised Statutes, Section 3176, as amended September 8, 1916, provides that "in case of *any* failure to make and file a return or list within the time prescribed by law or by the collector, the Commissioner of Internal Revenue shall add to the tax 50 per cent of its amount." It is further provided that "when a return is voluntarily and without notice from the Collector filed after such time, and it is shown that the failure to file was due to a reasonable cause, and not to willful neglect, no such addition shall be made to the tax." The court said: "On this record plaintiff is not entitled to the benefit of this exception. The fact of voluntary return without notice from the collector is not found * * *. Two witnesses testified, without dispute, that plaintiff refused, under advice of his accountant, to sign the excess profits tax return prepared by the revenue officers * * *.

"The sole substantial question presented is whether the penalty provision involved extends to failure to make a return of excess profits, or whether it is limited to failure to make *any* income tax return. In our opinion, the 50 per cent penalty applied to the failure to make an excess profits tax return."

In the Act of October 3, 1917, a distinction between ordinary income taxes and excess profits taxes was clearly recognized, separate and distinct provisions being made for return of the two classes of taxes. In 1917 the Commissioner provided two separate forms for individual tax returns, No. 1040, entitled "Individual income tax return for calendar year 1917," and No. 1101, entitled "Individual excess profits tax return for calendar year 1917." The court said: "We think the two returns, thus so clearly distinguished, in connection with the requirement of separate return on Form 1101, do not lose their separability * * * from the fact that the amount of the excess profits tax is to be carried onto Form 1040 under headings 34 and 35, designating respectively as 'excess profits tax at rate of 8 per cent,' * * * and 'excess profits tax on income from business with invested capital, as computed on excess profits tax return Form 1101,' nor from the fact that the excess profits tax is to be deducted, in line L of Form 1040, from the taxable income otherwise shown thereby."

BEER et al. v. MOFFATT, COLLECTOR

(U. S. Circuit Court of Appeals, Third Cir., December 19, 1913)
(209 Fed. 779)

Record: Suit to recover legacies tax paid under War Revenue Act of June 13, 1898. Judgment for defendant (192 Fed. 984). Affirmed on writ of error.

Facts: In 1904, the executors of Julius Beer paid over $14,000 tax on legacies given by the decedent's will. They brought suit after their claim for repayment had been disallowed. Julius Beer died July 18, 1901. His will gave the residue of his property, one-half to his wife and one-half to the executors to be divided into parts for his children, the income of each son's part to be paid him and $20,000 of the principal to be paid him on his arriving at the age of twenty-one and the balance on his arriving at the age of thirty-five; the income of each daughter's share to be paid her until she married, when $35,000 was to be paid her, the income on the balance to be paid her until her death, when such balance was to be paid to her issue. At the death of the testator each of the sons was over twenty-five, two of the daughters were married, the third

marrying a few months thereafter. The collector assessed the interest of each son as absolute and vested and of each daughter as a vested life estate. The taxing statute was repealed, effective July 1, 1902, the repealing statutes providing for the refund of tax upon "contingent beneficial interests which shall not have become vested prior to July 1, 1902."

Question: Did the legacies vest in possession or enjoyment before July 1, 1902?

Decision: The court affirmed the decision below, which held the legacies to have vested, and cited Vanderbilt v. Eidman, 196 U. S. 480, (post); Hertz v. Woodman, 218 U. S. 205, (post); United States v. Fidelity Trust Co., 222 U. S. 158, (post); and other cases.

BINGHAM'S ADMINISTRATOR et al. v. COMMONWEALTH
COMMONWEALTH v. BINGHAM'S ADMINISTRATOR et al.
(Court of Appeals of Kentucky, November 3, 1922)
(196 Ky. 318)

Record: Kentucky inheritance tax statute. Action by the state against the administrator et al. Both parties appealed from the decision of the lower court. Affirmed in part and reversed in part.

Facts: The following questions arose under the will of Mrs. Bingham, who died on July 27, 1917, a resident of Jefferson County, Kentucky.

Questions: (1) Was deceased possessed of property so as to render the disposition thereof by her will subject to the inheritance tax, such property having been left by the will of her deceased husband to trustees for her sole benefit, said trustees to pay her a definite part of the income annually for the period of the trust and then to pay her the principal with all accumulations?

(2) Are large blocks of stock and securities having a recognized market value to be appraised by the same rule as are small blocks thereof?

Decision: (1) Deceased was possessed of the property left in trust for her by her husband's will, all the beneficial interest being

in her and the principal and all accumulations to be transferred to her by the trustees after the termination of the trust period, and her disposition thereof by will was subject to the inheritance tax. The word "possess" in the statute must be given its common or ordinary meaning and the court looked to standard dictionaries rather than to the opinions of courts for the definition.

(2) "It is urged" that the "ask" and "buy" price on the New York market, while fair for small blocks of securities "cannot be justly or legally employed in appraising the large blocks owned by this estate," because such quotations are based upon transactions involving only from ten to one hundred shares "whereas Mrs. Bingham owned thousands, which could not have been disposed of at the quoted prices within six months," etc.

"This tax law, like all others in this state at least, contemplates, we are sure, the valuation of all property for taxation in such units as it is ordinarily traded in, rather than in blocks as it happens to be owned on the taxing date, because only by so doing is it possible to ascertain the fair cash value on the given date of any kind of property, and because, too, under our form of government, there cannot possibly be one method applicable to the rich and another to the poor for valuing the same kind of property on the same day."

BLACK v. RAFFERTY, COLLECTOR

(U. S. District Court, E. D. New York, February 14, 1923)
(287 Fed. 937)

Record: Revenue Act of 1918. Proceeding for injunction to restrain the collector from distraint and other proceedings to collect income tax assessments for 1918 and 1920. Injunction denied.

Facts: Complainant was assessed taxes for 1918 and for 1920 without any opportunity for a hearing. The bill further alleged that the Commissioner did not seek any proof or evidence regarding complainant's income. The first information of the action of the Commissioner was the notices from the collector demanding payment of amounts aggregating $526,146.31.

Question: May a suit to enjoin be brought, under these circumstances?

Decision: "Section 3224 of the Revised Statutes, provides that 'no suit for the purpose of restraining the assessment or collection of any tax can be maintained in any court.' This has repeatedly been before the courts." The decision of the District Court in Graham, Collector, v. Dupont, 283 Fed. 300 (ante 882), may be distinguished, as in that case Congress had barred a suit to collect the taxes by the statute of limitations and plaintiff would have had no adequate remedy at law if he had paid the tax and sued to recover it back. Regal Drug Corporation v. Wardell (post), and Lipke v. Lederer (ante 924), may be distinguished as involving the collection of a penalty.

BLAKE v. NATIONAL BANKS

(U. S. Supreme Court, October, 1874)
(23 Wall. 307)

Record: Revenue Act of July, 1870. Error to the Circuit Court, S. D. New York, which rendered a decree for plaintiffs in a case in which several national banks sued Blake, Collector, to recover taxes paid under protest during the last five months of 1870. Reversed.

Facts: The Act of 1864 assessed a tax of 5 per cent on incomes, including dividends, but provided that it should cease to be effective at the end of 1869. The Act of 1870 provided that the Act of 1864 should be construed to impose the taxes therein mentioned to the first day of August, 1870, and that after that date no taxes should be assessed under that statute. The 1870 Act further provided for a tax of 2½ per cent upon the incomes of persons residing in the United States and citizens residing abroad; that there should be levied and collected "for and during the year 1871" a tax of 2½ per cent on bond interest and on dividends "hereafter declared" by a corporation, and on all undivided profits accrued and earned and added to the surplus fund, etc. The banks sued the Collector to recover taxes they had paid on interest paid and dividends declared during the last five months of 1870. Judgments were entered for plaintiffs, the decision giving much of the reasoning of the lower court, and the defendant sued out a writ of error.

Question: Were dividends of the last five months of 1870 taxable and when may resort be had to the Congressional Record in interpreting statutes?

Decision: "The language of the Act of July 14, 1870, is too manifest to admit of a doubt that Congress intended to extend for two years the tax upon the incomes of individuals * * *. It is then provided by Section 6 that there shall be levied for the years 1870 and 1871 a tax upon individual incomes."

The Statute of 1864 provided for payment by the corporation of the tax on the dividends and corporate interest, such payments to be deducted in payments to the stockholders. The Congressional Journal shows that in the bill as it originally passed the House of Representatives, the words "for and during the year 1871" were not included; that the Senate added the words "during the years 1871 and 1872"; that the House disagreed to this and to other amendments; and that the report of the Conference Committee was agreed to, substituting the words "for and during the year 1871." "Connected directly with this point is the provision" that the tax imposed by the Act of 1864 should be construed to impose the tax therein mentioned to August 1, 1870. The Journal of the House also shows that the words "hereafter declared" formed a part of the original bill as it passed the House, and that the provision continuing the tax of the 1864 Act was not in the original House bill.

The dividends here in question were all declared after the passage of the Act and were therefore "hereafter declared." "Under these circumstances, we are compelled to ascertain the legislative intention by a recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records, and by giving such construction to the statute as we believe will carry out the intentions of Congress." The action of the two Houses as disclosed by the journal "does not correctly indicate the feeling of either body, as the House evidently wished to impose an extended tax, while the record shows that in several of its votes the Senate voted to abolish entirely the income tax, both as to individuals and as to corporations.

"The defendant's construction of the fifteenth section assumes that Congress imposed the tax upon corporations, until August 1st,

1870; that from that date till January 1st, 1871, no tax was imposed, and that after that period the tax was again imposed; that there was a hiatus for five months. The tax upon individuals meanwhile was imposed during the whole of the years 1870 and 1871. It is impossible to believe Congress intended to make this discrimination. It is entirely unreasonable, and is not in harmony with the well-known views of Congress on the subject."

"The ambiguous terms of the statute prevent the possibility of a satisfactory solution of the question presented. We are inclined to adopt the construction practically placed upon it by the administrative department of the Government, which is this: that effect is to be given to the words 'hereafter declared,' by holding that they cover all the dividends and additions of the year 1870, after the passage of the act; and that the words 'levied and collected during the year 1871' relate to the time when the tax is to be enforced rather than as a limitation to the tax itself. * * * The statute hereinbefore quoted, showing that the tax upon individual incomes is to be levied and collected in the year following the period for which they are imposed by the statute, is an illustration of what these words may mean. The words in question do not necessarily limit the kind of property to be taxed or the period of time for which the tax is laid. The tax cannot be levied or collected until 1871, but it may be imposed upon all dividends, additions, or payments of interest made or declared after the passage of the Act of July 17th, 1870."

Three of the justices dissented.

BLOUNT v. UNITED STATES

(U. S. Court of Claims, March 3, 1924)

(Not yet reported)

Record: Sections 201-203, Revenue Act of 1916. Action to recover estate taxes paid. Ordered that plaintiff recover additional taxes assessed by the Commissioner. (Pending in Supreme Court.)

Facts: Real estate was conveyed to the plaintiff, Lucia E. Blount, and her husband. He died in 1917. His will left all his property to his wife. As administratrix, she filed an estate tax return listing the half interest in this property and paid the tax.

Later, the Commissioner decided the entire interest in this real estate should have been included as a part of his estate, and an additional tax was levied of over $5,000. Payment was made under protest and her application for refund having been denied, she brought suit for its recovery. In the suit, it was stipulated that this property was held by the husband and wife as "tenants by the entirety," but the court said that the effect of the deeds was a matter of construction and the right of the parties to stipulate their effect would be subject to question.

Questions: (1) Should the estate of a decedent include real estate held by him and his wife as tenants by the entirety?

(2) Under the Act of 1916 may payment of an estate tax made without protest be recovered?

Decision: (1) "It follows that the tax should not be assessed against the estate of tenants by the entirety because the wife did not take as upon a transfer from the husband at his death, but took under the original grant, his estate ceasing. We think it doubtful whether subdivision (c) of Section 202 contemplates estates by the entirety in their technical sense. It speaks of an interest held jointly, or as tenant in the entirety by the decedent, 'and any other person.' Only an estate held by the husband and wife could be held by the entirety. It seems to us this language applies to an interest that passes as part of the estate; that is, an estate held jointly or *per my et per tout,* by the moiety and by the whole. Giving effect to the stipulation as to the character of the estate, the plaintiff should recover the amount of the tax collected by the Commissioner upon the lands conveyed to the husband and wife, except as it is affected by her return."

It was held the plaintiff was entitled to recover the additional tax levied by the Commissioner.

(2) "On the other hand, treating the tenancy as a joint tenancy, the one-half interest of the husband passing to the wife, the tax upon that interest was paid upon the tax return made by the wife. As already stated, the plaintiff returned for taxation a one-half interest in the lands as having been held 'by the decedent as a joint tenant,' and having paid the tax on this one-half interest voluntarily and without protest she can not now recover the same."

BLUNT v. UNITED STATES

(U. S. Circuit Court of Appeals, Seventh Cir., July 24, 1918. Rehearing December 13, 1918)
(255 Fed. 332)

Record: Criminal prosecution of Blunt for violation of the Harrison Narcotic Act. Conviction. Writ of error. Reversed in part and affirmed in part. (Certiorari denied, 249 U. S. 608.)

Facts: Blunt was a practicing physician in Chicago who dispensed and distributed certain derivatives of opium, and had registered and paid a special tax, and the charge was that he had unlawfully obtained, by means of order forms he had purchased from the Commissioner of Internal Revenue, certain quantities of morphine for a purpose other than the use or distribution thereof by him in his practice, but for sale to persons who were not physicians, etc. He did not file a separate registration setting out that he was a dealer and did not pay the special tax as a dealer.

Questions: (1) May Congress provide that any specific use of a tax-paid article shall be unlawful?

(2) Does the Act require that a separate registration be made and a separate tax paid by a physician who has registered and paid the tax as such, where he is also a dealer in the drugs mentioned in the statute?

Decision: (1) The power in Congress "to levy taxes on an article includes no right to make any specific use of such tax-paid article unlawful. * * * No question of tax or revenue or the protection or security thereof is involved; under this clause, it is declared unlawful for a physician who has paid the required license fee and has bought the order form essential to obtaining the drug, to consume it himself as a drug addict or to give it away or to sell it except in the legitimate exercise of his profession. In our judgment this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the states.

(2) Dealers and physicians are in distinct classes and each class is required to pay the tax. The combination of both occupa-

tions in one individual does not exempt him from payment of the two taxes.

BOISE TITLE & TRUST CO. v. EVANS, COLLECTOR

(U. S. District Court, D. Idaho, S. D., January 22, 1924)
(295 Fed. 223)

Record: Stamp tax, Revenue Act of 1917. Suit to recover stamp tax paid. Demurrer sustained and complaint dismissed.

Facts: Plaintiff purchased mortgaged property at a foreclosure sale, receiving a sheriff's deed. The collector demanded payment of the regular documentary stamp tax, which was paid under protest and this suit was brought to recover the amount. A demurrer was interposed.

Question: Was the sheriff's deed, issued in pursuance of a foreclosure decree of a state court, exempt from the stamp tax as an instrumentality of the state government?

Decision: In a mandamus proceeding by the plaintiff against the sheriff (Boise Title & Trust Co. v. Pfost, 32 Idaho 743) the Supreme Court of Idaho held that stamps were not required. The Federal court held the deed taxable, following the decisions in Home Title Insurance Co. v. Keith, 230 Fed. 905 (ante 263), and Farmers Loan & Trust Co. v. Council Bluffs G. & E. L. Co., 90 Fed. 806 (ante 206), saying:

"Admittedly the ultimate decision of the question is for the Federal rather than the state courts, and the reasoning of these cases being in harmony with my own independent view, I feel constrained to sustain the demurrer, and accordingly a judgment absolute, dismissing the complaint, will be entered."

BOLLES, RECEIVER, AMERICAN SYNTHETIC DYES, INC., v. EDWARDS, COLLECTOR

(U. S. Circuit Court of Appeals, Second Cir., April 28, 1924)
(299 Fed. 504)

Record: Revenue Act of 1916. Suit to recover munitions manufacturers' tax. Plaintiff appealed from a judgment for defendant (290 Fed. 1018). Affirmed.

Facts: The plaintiff manufactured and sold wet picric acid to the Russian and French governments for military purposes. Picric acid when dry is an extremely high explosive. When wet it can be safely transported. Wet picric acid is dried by spreading it in pans and drying it by hot air, a process which takes a number of hours to complete. Wet picric acid can be exploded under certain conditions. A tax was assessed, upon the claim that the picric acid in question is an explosive within the purview of Section 301 of Title III of the Revenue Act of 1916. It was conceded that the acid sold contained 10 per cent of moisture and that such acid containing less than 1 per cent of water is an explosive under Section 301 and is taxable. The record disclosed that picric acid was used extensively during the war as an explosive by the French and Russian governments.

Question: Is picric acid containing 10 per cent of water an explosive and taxable under the Revenue Act of 1916?

Decision: "Whether wet or dry, it is manufactured by the same process. * * * The chief function of the water in the manufacturing process appears to be the purification of the picric acid by removing all foreign impure acids created in the course of manufacture. There is no chemical association or combination of the ten per cent water retained with the picric acid crystals, and when the water is applied, it is conceded to be completely manufactured. The argument of the plaintiff-in-error proceeds upon the claim that the right to recover is based upon the behavior of the picric acid when wet with ten per cent or more of water as being different from the behavior when dry, that it to say, it is explosive when dry and not so when wet. But the picric acid crystals, which is the explosive substance, is found in wet and dry picric acid. The contracts expressly provided it to be made on a net dry weight basis and the fact is not controverted that with the ten per cent moisture it could be dried and made available as an explosive by merely exposing the acid to a dry atmosphere. Merely providing for moisture or water to guard against explosion during shipment does not change the character of the manufactured product."

"The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose

for which it was designed. (Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 513 [ante 223].) In the instant case, it cannot be successfully argued that the picric acid manufactured by the American Synthetic Dyes, Inc., was no more than a material entering into and used as a component part of the manufacture of the explosive. The debates in Congress do not support the claims of the plaintiff-in-error. The product manufactured was clearly an explosive within the meaning of the act. (Dayton Brass Co. v. Gilligan, 277 Fed. 227 [ante 874].)"

BONBRIGHT & CO. v. STATE

(New York Supreme Court, Appellate Division, Third Department, January 6, 1915)
(151 N. Y. S. 35)

Record: Section 270, New York tax law, as amended. Action by Bonbright & Co., a partnership, against the State of New York. From a determination by the Board of Claims awarding a certain sum to claimants, the state appeals. Determination reversed and bill dismissed.

Facts: In 1912, a corporation of practically the same name was organized by the partnership to continue the business, all the stock being issued to the firm in exchange for its business and assets. The common stock was issued to the firm in one certificate. A large number of shares were sold by the firm, the latter issuing receipts for the purchase price, providing for the issuance of trustees' certificates to the holders. With the consent of these purchasers, the firm entered into an agreement with a trust company, vesting in it legal title to all the shares for ten years in trust for certain purposes. The trust company issued "certificates of interest" to the purchasers and to the firm. All the beneficial ownership in such shares, including the right to vote thereon, was in the certificate holders. The firm endorsed the certificate for the common stock to the trust company, paying under protest for the transfer stamps. The certificate was surrendered to the corporation and a new certificate issued to the trust company. The firm contended that only the part thereof representing the certificates purchased from it and which it did not own was subject to the stamp tax and that

the shares belonging to it were exempt from tax. It asked a return of the amount paid for the last-mentioned item.

Question: Was the transfer subject to the state stamp tax as to the shares the beneficial ownership of which remained in the firm?

Decision: The court said that the statute, prior to amendment, under the decision in U. S. Radiator Co. v. State of New York, 208 N. Y. 144, did not impose the tax in question, the beneficial ownership remaining the same. "The amended statute says that the *transfer of a certificate* of stock, which invests the holder either with the beneficial interest or with the *legal title* to the stock, is taxable. * * * The statute indicates a purpose * * * to tax the transfers of *certificates* (and, of course, certificates are not shares) of stock, as well as the transfer of *shares* of stock." The court held that the tax was properly assessed.

BOSS v. UNITED STATES et al.

(U. S. Circuit Court of Appeals, Ninth Cir., June 18, 1923)
(290 Fed. 167)

Record: Revenue Act of 1916 as amended by the Revenue Act of 1917. Suit by the Government to collect taxes. Judgment of the District Court in its favor (285 Fed. 410) affirmed.

Facts: The Boss & Peake Automobile Company, of which Boss and Peake were the sole stockholders, was dissolved on or about June 22, 1917. Prior to that time, about June 1, 1917, Peake had transferred all of his stock to Boss in consideration of a cash payment. On May 1, 1920, an income tax against the company was assessed under the provisions of the Revenue Acts of 1916 and 1917 in the sum of $12,405.30. Boss paid half of this tax but denied liability for the balance. The Government sued the corporation and Boss and Peake individually. Boss interposed a cross-complaint, claiming that, on dissolution of the corporation, Peake received half the assets and that he should pay half the tax. The court below entered a decree in favor of the Government and against Boss, but dismissed the complaint as to Peake and likewise the cross-complaint. Boss alone appealed.

Question: Who was liable for the taxes assessed?

Decision: The court held that the stockholders of the dissolved corporation are liable for taxes due from the corporation to the extent of assets received and that although the company was dissolved prior to the passage of the Revenue Act of October 3, 1917, nevertheless the provisions of that Act, being retroactive, were applicable, and that the law was constitutional. Boss was found to be the sole stockholder at the time of the dissolution, and liable for the entire tax, to the extent of assets received by him at the time of the dissolution of the corporation.

BOSTON ELEVATED RAILWAY COMPANY v. MALLEY, COLLECTOR

(U. S. District Court, D. Massachusetts, April 27, 1923)
(288 Fed. 864)

Record: Revenue Act of October 3, 1917. Action at law to recover taxes assessed and paid under Section 500 thereof, providing for a tax upon the amount paid for transportation by water. Demurrer of the defendant sustained.

Facts: The plaintiff chartered in 1911 the steamship "Everett" from the New England Coal & Coke Company for ten years at $15,000 per year for carrying merchandise. In 1917, the United States Shipping Board requisitioned the steamship and by agreement entered into between the plaintiff, the New England Fuel & Transportation Company, then owner, and the Shipping Board, the plaintiff was permitted to operate the vessel in its own service for the transportation of coal under terms and conditions similar to those in the original charter, and the transportation company was made the agent of the Board to operate the steamship until it should be withdrawn from such service. The plaintiff paid to the transportation company as agent, various sums of money as charter hire and in addition the transportation company demanded and collected from the plaintiff 3 per cent of such sums as a transportation tax, and paid over the sum to the defendant, then Collector of Internal Revenue. On May 22, 1918, the legislature of Massachusetts passed an act providing for the public operation of the Boston Elevated Railway, and on July 1, 1918, the trustees appointed

thereunder took possession for the purpose of operating said railway.

Questions: (1) Were the taxes illegally exacted in that the charter hire paid by the plaintiff for the steamship "Everett" was not an amount paid for the transportation of property by freight within the meaning of Section 500 of the Revenue Act of 1917?

(2) Were the taxes collected after July 1, 1918, based on services rendered to the Commonwealth of Massachusetts and not subject to a tax?

Decision: (1) "In order to pass upon the first contention of the plaintiff it is necessary to determine whether the charter under which the plaintiff was acting was essentially a lease of the vessel or a contract for service. This depends upon the degree of control over the vessel given the respective parties under the charter. If the whole control over the vessel and its navigation is given the charterer, he is doubtless the owner for the time being, has a lease of the vessel and thus furnishes his own transportation. If, on the other hand, the owner retains control, the charterer has a contract for services only and buys transportation of the owner."

The court found that under the charter agreement the plaintiff did not have sufficient control over the vessel to make it a lessee.

(2) The court concluded that the Act of the Commonwealth of Massachusetts passed May 22, 1918, put the operation of the railway company under the control of the Commonwealth, making it a sort of guardian, but did not provide for government ownership.

Section 501 of the Act of October 3, 1917, provides that the "taxes * * * shall be paid by the person or corporation * * * , paying for the service or facilities rendered." It is clear that the payment for the transportation in this case was made by the railway company, and it is the "payment" that is made taxable by the statute. The exception refers to payments made by a State. "No tax shall be imposed upon any payment received for services rendered * * * any State."

"This contemplates a disbursement by a State in its sovereign capacity, a payment made at the time for transportation services

rendered. The fact that the State may be then or thereafter lending or giving money to the corporation does not change the liability for the tax.''

BOSTON INSURANCE CO. v. UNITED STATES

(U. S. Court of Claims, November 5, 1923)
(Not yet reported)

Record: Section 12 (c), Revenue Act, September 8, 1916. Suit for the refund of certain taxes. Judgment for plaintiff. (Pending in the Supreme Court.)

Facts: Plaintiff was a Massachusetts fire and marine insurance corporation which had complied with the New York law so that it might do business in that state. The New York superintendent of insurance required it to establish and maintain a reserve for loss claims. The New York statute did not in terms require this, but, with other items, it was left to the discretion of the superintendent of insurance. The section of the revenue law above mentioned authorized an insurance company to deduct from its gross income ''the net addition, if any, required by law to be made within the year to reserve funds,'' etc. As the reserve fund in this case was not specifically required by the statute but only by the regulations of the state superintendent of insurance, the Government did not allow this deduction.

Question: Were net additions to this reserve for loss claims as required by the state superintendent of insurance, deductible from gross income under the revenue act?

Decision: The New York courts had determined that a foreign insurance company must comply with the requirements of the state before being allowed to transact business therein and the requirement as to such reserve funds was governed by regulations issued by the state superintendent of insurance. The court determined that this reserve for loss claims falls within the revenue act and that the company was entitled to a deduction of the net additions to this reserve for the year in question. The court quoted from and followed the decision in Maryland Casualty Co. v. United States, 251 U. S. 342 (ante 332).

BRAINARD et al. v. NEW YORK CENTRAL R. CO. et al.

(N. Y. Supreme Court, Special Term, New York County, April, 1924)
(204 N. Y. S. 877)

Record: Action by minority stockholders of a lessor company to compel reimbursement for federal income taxes paid by that company, the lessee company having agreed in the lease to pay all taxes, etc. Judgment for plaintiffs.

Facts: Mahoning Coal Railroad Co., an Ohio corporation, owned a railroad in New York. It made a traffic agreement with the L. S. & M. S. R. Co., transferring its road and property to be managed and operated by the latter company for 25 years. A later lease was made "in perpetuity" under which the entire property of the Mahoning Company, including its franchises, except its corporate franchise, was to be continued to be held, managed and operated by the Lake Shore Company, all profits to be divided, 40 per cent to the Mahoning Company and 60 per cent to the Lake Shore Company, with certain provisions as to bond interest and dividends of the Mahoning Company. The lease provided that the Lake Shore Company "will in due season pay all taxes and assessments which may be levied or become chargeable on the said road, or property, or upon the said Mahoning Company by reason of its ownership thereof." The Lake Shore Company by agreement was to take the place of the Mahoning Company with like powers and rights and "subject to like duties and obligations" then existing or which might in the future be imposed upon "said Mahoning Company, and the Lake Shore Company expressly covenanted that it would "observe and perform such duties and obligations in like manner as the said Mahoning Company would be bound to do." The New York Central R. Co. became the successor lessee and assumed all the obligations of the Lake Shore Company under the lease.

Question: Did the covenant in the lease require the lessee to pay the federal income taxes assessed against the lessor?

Decision: "As taxes are a part of the expenses of operation of a railroad company, and are to be considered in fixing rates of

transportation, it becomes evident that it was the intention of the parties that the lessee having the power to readjust rates to cover the expense of taxes, should pay all taxes of every kind and nature whether levied against the property itself or 'chargeable' upon 'the said Mahoning Company by reason of its ownership thereof.' Although the federal income tax was not in force in 1884, yet such income taxes had formerly been levied during and after the Civil War, and the parties must have contemplated that the lessor might be 'chargeable' with any form of taxation, including a tax upon the net income derived directly or even indirectly by it 'by reason of its ownership' of the said road. As it was the intent of the parties that the lessee should bear every operating expense, and should pay every tax of every name and description, it becomes unnecessary to discuss the technical nature of an income tax, or to review the numerous cases cited by counsel relating thereto. The lessor itself, having no property left to operate, derives its entire income from the 40 per cent of the gross earnings of its road, and from certain interest returns upon such earnings and the investment thereof. Hence, all its taxes result directly or indirectly 'by reason of its ownership' of its road, and the mere fact that the lessor has thus indirectly and incidentally derived other income from interest, etc., does not relieve the lessee from its obligation to 'pay all taxes' of every kind and nature in accord with the intent of the parties as disclosed by the entire lease, and the surrounding facts, and not merely by the particular words of the tax clause itself which was evidently intended to be as broad as possible.''

The Lake Shore Company had paid all taxes assessed against the lessor company, including the federal income taxes, from 1909 until December, 1914, and the New York Company thereafter paid such taxes until March, 1921. This practical interpretation of the lease by the parties was held binding, although defendant contended the payments were made through inadvertence and mistake. The defendant company had become a controlling stockholder in the Mahoning Company and the taxes in question had been paid by the latter company on the advice of the former.

BRILLIANT COAL CO. v. UNITED STATES

(U. S. Court of Claims, March 31, 1924)
(Not yet reported)

Record: Section 12, Revenue Act of 1916. Suit for recovery of income and excess profits taxes paid. Judgment for plaintiff. (Taken to U. S. Supreme Court.)

Facts: Plaintiff is an Alabama coal mining company. During the year 1917 the company had outstanding capital stock amounting to $300,000 and a bonded indebtedness created in 1907 of $250,000 drawing interest at six per cent per annum. The net income of the company for the year 1917 was $158,696.23, from which the company deducted the sum of $81,977.50, the interest actually paid by it during 1917 upon its bonded indebtedness, leaving a balance of $76,718.73, upon which a tax of $14,726.32 was assessed and duly paid. Because in the interest actually paid in 1917 there was included $67,187.50 interest due in the years 1913 to 1916, inclusive, the deduction to that extent was disallowed and additional tax was assessed. The company maintained that the additional tax was invalid. Because of lack of funds the interest was not demanded nor paid before the year 1917, for the years 1913 to 1916. The tax was paid under protest and claims for refund and abatement were duly made. Over $7,000 was repaid to claimant because of payments it had made of interest in 1917 on the deferred payments of interest. This suit was brought for the balance of the claim. The statute provided a deduction of "The amount of interest paid within the year on its indebtedness to an amount of such indebtedness not in excess of the sum of (a) the entire amount of the paid-up capital stock outstanding at the close of the year * * * and (b) one-half of the interest-bearing indebtedness then outstanding."

Questions: (1) Was interest which accrued in prior years but not paid until 1917 deductible from the company's gross income for that year?

(2) What effect does the fact of the limitation of the indebtedness have upon the rule in this regard?

Decision: (1) The court quoted from the letter of the Commissioner rejecting the claim for abatement, that the deduction was limited to the interest *accrued and paid.* The Revenue Act of 1913 contained this limitation but the 1916 Act omitted the words "accrued and." This omission occured also in the Acts of March 3, 1917, and October 3, 1917, and the intention of Congress to liberalize this matter of deduction was indicated by the use of the words "paid or accrued" in the 1918 Act. "There seems room for no other conclusion than that under the revenue acts of 1916 and 1917 deduction was authorized of interest on indebtedness 'paid' during the year whether accrued during that or preceding years."

(2) The limitation as to the amount of the interest deductible under the statute was exceeded if the limitation is as to one computation at 6 per cent on one-half of the indebtedness and the entire net capital stock. The amount claimed as a deduction for such interest was said to indicate an indebtedness of $1,366,291.66, "and such the plaintiff did not have."

"The more liberal and equitable policy, operating to put the less prosperous corporations on substantially the same basis as the more prosperous ones and first manifest in the Revenue Act of 1916 by the elimination of the words 'accrued and,' would be wholly nullified if this plaintiff were not permitted to deduct theretofore accrued interest paid in 1917."

BROWN v. LONG

(Massachusetts Supreme Judicial Court, July 1, 1922)
(136 N. E. 188)

Record: The Forty-fourth Amendment to the Massachusetts Constitution and the State Income Tax Statute. Suit for abatement of a state income tax. Demurrer. Judgment for complainant.

Facts: Brown sued Long, Commissioner of Corporations and Taxation, for abatement of an income tax. The taxation was on the difference between the selling price of certain shares of stock and their value on January 1, 1916, when their value was less than the cost. It was his contention that only the difference between the amount paid by him and the selling price was subject to the tax.

Question: What is the basis for taxation on property sold, which was acquired before January 1, 1916?

Decision: The Forty-fourth Amendment gave full power and authority "to impose and levy a tax on income." The statute taxed the excess of the gains over the losses, received by the taxpayer upon purchases or sales of intangible personal property. It provided that the basis of determination in case of property owned on January 1, 1916, "should be the value on that date." The word "income" as used in the amendment of the statute "must be rationally construed and not stretched to include purely theoretical as distinguished from practical conceptions. Income as a subject of taxation imports an actual gain. It must mean an increase of wealth out of which money may be taken to satisfy the pecuniary imposition laid for the support of government. * * *

"Plainly gain derived from the sale of stock comes within the meaning of the word 'income.' * * *

"It is manifest that the actual increase in wealth which came to the complainant out of his transaction in stock did not exceed the difference between the cost to him when he bought and the price received when he sold. The circumstance that on January 1, 1916, the market value of the stock was much less than he paid is an immaterial factor in ascertaining his actual material profit. His investment had been made long before that date at a higher price. He made no purchase on that date.

"The excess of gains over losses made subject to taxation by section 5 cannot be more than the actual gain above the original investment, whether that was made before or after January 1, 1916. The terms of section 7 afford the means of calculating the gain on a sale for a price in excess of the value on January 1, 1916, when that value is in excess of the value of the original investment made before that date. The tax law in this respect avoids difficulties pointed out in Tax Commissioner v. Putnam, 227 Mass. at page 529 [ante 510]."

BROWN et al. v. UNITED STATES et al.
(U. S. District Court, N. D. Illinois, E. D., 1920)
(298 Fed. 177)

Record: Section 1001, Revenue Act of 1918. Suit by Brown and others to recover taxes paid as a broker. Defendants' demurrer overruled.

Facts: Plaintiffs were alleged to be livestock commission merchants, dealing in cattle, sheep and hogs consigned to them, and the collector exacted of them a special tax as brokers. The statute provided " 'every person whose business it is to negotiate purchases or sales of * * * produce or merchandise, for others, shall be regarded as a broker.' " The Government contended that cattle, sheep and hogs come within the act as "merchandise."

Question: Are livestock commission merchants dealers in "merchandise" and taxable as brokers?

Decision: The Government urged that the special reasons for holding that live stock comes under the 1918 act as merchandise, are found in the provisions of the various revenue acts. "From a consideration of the several acts it is perfectly clear that there was not running through all of the acts any well defined scheme of classification of subjects to be taxed. For instance, in the acts of 1864 and 1866, horse dealers and four different sorts of brokers are mentioned. In the acts of 1898 and 1914 only two kinds of brokers were taxed, and in the act of 1918 only one kind was taxed. That is to say, in the acts of 1864 and 1866 there were brokers, cattle brokers, produce brokers and commercial brokers; in the acts of 1898 and 1914 there were brokers and commercial brokers; and in the act of 1918 just brokers. In none of the acts prior to 1918 was the word 'merchandise' used in connection with any kind of a broker, except that it appeared in all of the acts defining a commercial broker, and in the section of the act of 1914 taxing commission merchants.

"The theory of the Government is that the word 'merchandise' in the act of 1918 was adopted from the sections relating to commission merchants in the act of 1914, but from a reading of the several acts it seems to be much more probable that it was adopted from

the sections relating to a commercial broker, because all of the sections relating to commercial brokers, as well as the section here in question, describe not only a broker, but also a commercial broker as a person whose business it is to negotiate purchases or sales, whereas a commission merchant is defined as a person, etc., whose business or occupation it is to receive into his or its possession any goods, etc. It will be noted that in all of the acts relating to brokers, including the one in question, the business to be done, that is negotiating sales or purchases of goods, etc., was not changed, but the things to be negotiated about were varied as indicated.

"The allegations of the declaration would bring the plaintiffs within the terms of the act of 1914 relating to commission merchants, if the word 'merchandise,' as used in that section, covered livestock, but livestock does not in my opinion come within the provisions of the Act of 1918. A thing is not to be taxed unless it is plainly within the meaning of the words used. First Trust & Savings Bank v. Smietanka, 268 Fed. 230 [ante 215]. The demurrer is overruled."

BURK-WAGGONER OIL ASSOCIATION v. HOPKINS

(U. S. District Court, N. D. Texas, Dallas D., March 3, 1924)

(296 Fed. 492)*

Record: Sections 1, 218, and 335, Revenue Act of 1918; Sections 1, 2, 8 and 9 of Article 1 of the Constitution, and the 5th, 6th, and 16th Amendments. Action for recovery of income tax. Judgment for defendant on demurrer. (Pending in Supreme Court.)

Facts: Plaintiff alleges it is an unincorporated association or partnership; that its members contributed $60,000 as capital to be used in producing oil; that in 1919 it received a profit of $1,838,053.90; that it was required to pay $561,279.20 taxes thereon, being the corporation tax, which it paid in installments, the last to defendant and the first three to his predecessor; and that all of the payments were made under protest and to avoid penalties and seizure. Defendant replied by a general demurrer and general denial.

The agreement for the formation of this "unincorporated joint-stock association" provided that unless sooner dissolved it

should continue during certain lives and twenty-one years thereafter; that its purpose was the mining of oil, etc.; that the capital stock should be $60,000, divided into 600 shares of $100 each, to be evidenced by certificates; that such certificates referred to the plaintiff as a joint-stock association and were transferable only on the books of the company; that no member should have authority to transact business for the association or be personally liable for its debts; that the shareholders should have no right of partition; that the shares should be personal property, entitling the holder to a proportionate share in the profits, and of the principal on the termination of the trust; that the death of a member or the transfer of his interest should not work a dissolution; that the affairs of the company should be managed by a board of six stockholding trustees whose successors should be elected annually; that each board should elect its own officers and prescribe their duties; that the title to all property was to be in the trustees, who should hold as joint tenants; that the trustees might sue or be sued or the company might sue in its name, as provided by the statutes of Texas; that the remaining members of the board of trustees might fill a vacancy, subject to the right of the shareholders to do so; that the board was to declare and pay dividends as they deemed expedient; that such board should have no power to bind the shareholders personally; that this declaration of trust should be referred to in every contract made and anyone contracting with the company should look only to property for payment of any debt or judgment; that neither the trustees nor any shareholder should be personally liable for any debt; that the board might adopt by-laws; that the shareholders might amend the articles of association or the by-laws; that annual meetings of the shareholders should be held; that the members of the board of trustees were at all times subject to orders from or removal by the shareholders; and that $40,000 of the capital was to be paid by the transfer of an oil and gas lease, the remainder to be paid in cash. About 200 persons were certificate holders and the certificates were traded in generally by the public.

Questions: (1) Was this unincorporated organization a partnership or was it a joint-stock company or an association and taxable as a corporation?

(2) Is the addition of the words "properly so-called" after the word "partnerships" in Article 1501 of Regulations 45 illegal as an attempt at legislation?

(3) If the act authorizes taxation as a corporation in such a case, is it unconstitutional as imposing on an individual a tax as an alleged income tax where the individual is in fact without a net income?

(4) If the act authorizes taxation as a corporation in such a case, is it unconstitutional as depriving a taxpayer of due process of law and as not providing uniform taxation?

Decision: (1) Trustees and probably the members of such an association are liable for its debts to third parties, but when viewed from a taxing standpoint "and in that herding where the accepted classification puts them as well-known and distinctive commercial enterprises, they wear, likewise, another label, another livery, another name." The mere fact that such liability exists would not of itself "divest such association or joint-stock company of its standing as an association or joint-stock company." Such aggregations of men have more points of similarity with partnerships than corporations, "and yet, in one sense, the corporation is also a partnership * * *. Nowhere in the articles of association is the plaintiff referred to as a partnership; this suit is not brought as a partnership; the owners of it do not appear here and sue in their individual capacities." They come under the Texas statute authorizing an association or joint-stock company to sue and be sued. "An unincorporated company, fundamentally a large partnership, may be said to be an association, and with certain provisions may be said to be a joint-stock company, and it will differ mainly from a partnership in that it is not bound by the acts of the individual partners, but only by those of its managers; that its shares are transferable; and that it is not dissolved by the retirement, death, bankruptcy, etc., of its individual members."

A joint-stock company at common law was midway between a corporation and a partnership. It was not a true partnership because its members are recognized as an aggregate body; it was not a pure corporation because its members are more or less liable to contribute to the debts of the collective whole. A distinction is made between a partnership which does not and one which does have the characteristics of an association or a joint-stock company. When it has such characteristics "it comes within the provisions of the law which relate to it." The court quotes from Haiku Sugar Co. v. Johnstone, 249 Fed. 103, (ante 245); " 'In a joint-stock company the members have no right to decide what new members shall be admitted to the firm; in the other hand, the right of delectus personarum is an inherent quality of the ordinary partnership.' "

(2) When the Internal Revenue office explained "in this regulation its understanding of the statute it was not legislating. It was enforcing. That the Congress, after this construction, passed a similar law with the exact wording would certainly indicate that it was satisfied with the construction and definition that the Executive Department had placed on its act."

(3) "A person, in order to question the constitutionality of a statute, must show that the alleged unconstitutional feature injures him, and, in fact, deprives him of rights secured to him by the Constitution. * * * The stockholders of the plaintiff, whose rights are said to be affected in this case, and for whom the plaintiff is solicitous in this suit, are not parties to this litigation and would not be bound by any determination reached herein."

(4) The court quoted from LaBelle Iron Works v. U. S. 256 U. S. 377 (ante 294): " 'The construction of the excess profits tax provisions as basing the tax on invested capital, which is determined only by the value of the assets at the time of their acquisition, to the exclusion of subsequent increase of value, does not deprive the taxpayer of due process of law, since equality of taxation can never be attained, and the tax in question applies equally to all corporations similarly situated.' The observation applies, likewise, to the tax imposed on joint-stock associations because

it applies equally to all such companies similarly situated, and is therefore uniform."

BURROUGH v. ABEL

(U. S. Circuit Court, E. D. Pennsylvania, March 1, 1900, and December 17, 1900)

(100 Fed. 66 and 105 Fed. 366)

Record: Acts of July 1, 1862, March 7, 1864, June 30, 1864, and July 20, 1868. Action to recover Internal Revenue taxes alleged to have been illegally exacted. Judgment for claimant, including certain interest.

Facts: Burrough endeavored to recover certain revenue taxes paid on distilled spirits, and interest. These spirits were entered in a bonded warehouse and upon being withdrawn a tax was required according to the quantity originally placed in the warehouse, although there had been a very large loss through leakage, etc. The spirits were withdrawn from the warehouse on or before April 30, 1869. A claim for refund was filed, which was rejected. This action was begun on October 28, 1897.

Questions: (1) May recovery be had of taxes paid on the original amount of spirits placed in the warehouse where, because of leakage, etc., much less was finally withdrawn?

(2) If the tax was erroneously exacted, should interest be allowed?

Decision: (1) The acts in question aside from the Act of 1868 did not impose the duty on the spirits until they were removed for consumption or sale. The result was that no duty was laid upon the quantity that had disappeared by leakage or evaporation prior to the Act of 1868. The Government contended that that act, which taxed the amount placed in storage without regard to subsequent leakage, had a retroactive effect and imposed a tax on all the spirits distilled. "A retroactive tax or duty upon property that has no longer any existence is new in my experience" and the taxing statute of 1868 must have referred to such spirits as were then actually in the warehouse and capable of being taxed. If the spirits had been destroyed by fire, clearly no tax could be levied and the same rule should

apply in this case. The parties having agreed upon the amount which was actually in the bonded warehouse on July 20, 1868, the plaintiff was held entitled to recover the tax he had paid on the excess which had disappeared prior to that time.

(2) Plaintiff was held not entitled to interest for the entire period, but only from the time he commenced the suit, because of the long delay in the prosecution of the claim.

BUSH v. LAW et al.

(N. Y. Supreme Court, Appellate Division, 3rd Dept., September 19, 1923)

(201 N. Y. S. 513)

Record: New York Income Tax statute of 1919. Claim for deductible loss was disallowed by the State Tax Commission. Writ of certiorari. The Commission's determination was confirmed.

Facts: Bush's real estate in Brooklyn was taken on requisition of the President of the United States on April 6, 1918. Its valuation was fixed in 1919, and Bush was required to make a deed of the property on February 10, 1919. In 1919, the New York legislature passed an income tax law providing that for determining the gain or loss resulting from a sale of property acquired before that date its value on January 1, 1919, should be the basis. The amount paid Bush was more than the original cost plus betterments, but was less than the value on January 1, 1919. His claim for a deductible loss therefor was disallowed by the State Tax Commission. Thereupon he brought this suit.

Question: Should this be considered a loss such as is deductible under the statute?

Decision: "Determination confirmed * * * upon the authority of People ex rel Klauber v. Wendell, * * * 188 N. Y. Supp. 301; affirmed 232 N. Y. 549 * * * and People ex rel Keim v. Wendell, * * * 193 N. Y. Supp. 143." (The Klauber case held that where property was sold for more than its market value on January 1, 1919, but for less than cost, there could be no tax as there was no actual gain. The Keim case held that only so much of a loss on a sale as accrued after January 1, 1919, could be deductible from income for purposes of the income tax, the court

saying, "It was not the intention of the Legislature to impose the burden of a tax to be collected in 1920 upon profits, or to allow deductions for losses, which had accrued for years prior to January 1, 1919.")

CADWALADER et al. v. STURGESS, COLLECTOR

(U. S. Circuit Court of Appeals, 3rd Cir. February 29, 1924)
(297 Fed. 73)

Record: Section 250 (d), Revenue Act of 1921, and Section 3224 R. S. Suit in equity to enjoin collection of income taxes. Bill dismissed (292 Fed. 1012). Affirmed on appeal. (A writ of certiorari was denied by the Supreme Court on May 5, 1924.)

Facts: An additional tax was assessed against the executors of Roebling on account of his income for the year 1917. On a claim for abatement, the Commissioner reduced the tax. After demand for payment of this sum, the executors, instead of paying and suing for recovery, brought this suit by bill in equity to restrain collection of the tax, alleging that the collector threatened distraint; that such distraint is prohibited by the five-year limitation; that there is no authority in law for the collection of the tax; and that, if the threatened distraint is not enjoined, they will be without legal or adequate remedy. On motion of the collector, the District Court dismissed the bill, under Section 3224 R. S. and on the authority of Graham v. DuPont, 262 U. S. 234 (post). Complainants appealed. The action was instituted more than five years after Roebling's return was filed and complainants contended that the threatened distraint or seizure of property would constitute a suit or proceeding prohibited by Section 250 (d) of the Revenue Act of 1921 and that if the tax were collected they would be barred from recovering it, first by Section 252 of the Revenue Acts of 1918 and 1921, which provides that "no such credit or refund shall be allowed or made after five years from the date when the return was made" unless a claim had been filed, and, second, by the provisions of Section 3226 R. S. that no suit should be maintained for the recovery of any internal revenue taxes until after a claim for refund or credit had been filed, etc. They also contended that Section 3224 R. S., providing that no suit should be brought to restrain the assess-

ment or collection of any tax, did not apply because the collector had lost jurisdiction over the tax by failing to act within five years, and that the tax itself had ceased to exist after the expiration of the five-year limitation and the taxpayer had ceased to be liable.

Question: May this suit to enjoin the collection of the tax be maintained?

Decision: The court said that the sole question raised was as to the proper procedure to be followed by one who seeks to avoid the payment of federal taxes which he believes to be illegally assessed. As to the other questions presented by the complainants, the court said it was not called upon to express an opinion. "They are, admittedly, questions of law triable some time, somewhere. They are not triable in a court of equity when a court of law is equipped to try them and when it affords a plain and adequate remedy."

The complainants' bill shows they have a plain, adequate and complete remedy at law and that their case falls within the decision in Graham v. Du Pont, which was followed in Bashara v. Hopkins, 295 Fed. 319 (ante); Seaman v. Bowers, 297 Fed. 371 (post), and other cases.

"The amendment of March 3, 1923, * * * concerning suits to recover taxes illegally assessed or collected, adds to section 3226, R. S., before quoted, these words: 'Unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. * * *'" The court said that by force of this amendment, enacted prior to the institution of this suit "they had full opportunity, and still have, to pay the tax, ask for a refund and, if rejected, institute a suit at law and there try out the questions they have raised in this suit in equity."

CANAL AND BANKING CO. v. NEW ORLEANS

(U. S. Supreme Court, October, 1878)
(99 U. S. 97)

Record: Writ of error to Supreme Court of Louisiana to review its judgment affirming that of the Superior Court for taxes of the City of New Orleans. Affirmed.

Facts: Suit against the bank for states taxes. The bank was assessed for the year 1876, in addition to its real estate, on $700,000 as its capital. The bank refused to pay on the ground that its capital not invested in real estate consisted of United States legal tender notes. The statement of assets showed them to consist of many items aggregating nearly $3,000,000, aside from the real estate and the cash on hand including the legal tender notes.

Question: May the bank fix upon its cash on hand as a part of its capital instead of other assets?

Decision: The court said that it did not lie with the bank to single out a particular item of assets and say that that item, and no other, constituted its capital at the time. Its cash on hand was just as applicable to its deposits and other obligations as to its capital. "The bank had probably been in existence for years. It is to be presumed that its original capital, not invested in real estate, had been loaned out to its customers, and was rather represented by its discounted bills than by the cash in its drawer." As no right of the bank secured by the constitution had been invaded, the judgment was affirmed.

CAPEWELL HORSE NAIL COMPANY v. WALSH, COLLECTOR

(U. S. District Court, D. Connecticut, February 21, 1923, and June 28, 1923)
(Not reported)

Record: Revenue Act of October 3, 1913, and Section 252, Revenue Act of 1918. Suit for the recovery of taxes paid. Demurrer. Demurrer overruled.

Facts: Plaintiff, a Connecticut corporation, filed its return for 1916. It alleged that it owned a subsidiary company, the operating expenses of which were paid by it, and that the subsidiary company had a net loss. This loss the plaintiff deducted as an expense of operation. The Department refused to allow this deduction and assessed a further tax of $416.64. A claim for abatement was disallowed, and a penalty and interest aggregating $49.99 were added. This was paid and a claim for refund was disallowed. This suit was brought for the recovery of this

amount, together with the amount of a similar claim for 1917. A demurrer was interposed on the grounds that the plaintiff had failed to allege payment under protest, and that the complaint showed the payment was voluntary. On the reargument, it was contended that Fox v. Edwards, 287 Fed. 669 (post), held that after a claim for refund was denied, no suit would lie unless the original tax was paid under protest.

Questions: (1) May recovery be had where the taxes were not paid under a formal protest?

(2) Is a claim for abatement equivalent to a protest?

Decision: (1) The court said that the identical question was determined adversely to the Government in Greenport Basin & Construction Co. v. United States, 269 Fed. 58 (ante 242). Section 252 of the Revenue Act of 1918 was quoted, and the court said: "It appears that under the specific provisions of the Act, the plaintiff is entitled to the refund whenever it appears, upon an examination of the return, that the amount of the tax paid is in excess of that properly due. It is the claim of the plaintiff that it does appear upon the face of the return that the amount paid to the Government is in excess of what was properly due, and this contention is not challenged by the Government. Under such circumstances, the money is properly recoverable when paid, wholly irrespective of the existence or non-existence of protest at the time of payment. The Act of Congress does not provide for the making of any protest as a condition precedent to the right of recovery. In U. S. v. Hvoslef, supra [237 U. S. 1, post] in which a similar statute was construed, the Supreme Court held that under such a statute, the payment of monies to the Government in excess of what was due could be recovered, irrespective of whether or not there was a protest filed at the time the payment was made."

(2) The court quoted from the decision in Fox v. Edwards and said that the plaintiff therein filed an amended return showing a voluntary overpayment based on figures for which he alone was responsible, while in the case at bar an additional tax was assessed and payment thereof required. The plaintiff thereon filed a claim in abatement, which was denied, and then the suit

was brought. "The claim of abatement made by the plaintiff, and before the payment of the tax, is a sufficient protest to constitute the protest necessary."

Greenport Basin & Construction Co. v. United States held that the objects of such a protest are to define the taxpayer's attitude and to notify the Government thereof. A claim for abatement was held by the District Court therein to be equivalent to a protest, and this was evidently adopted by the Supreme Court, which referred to the payment as made "under protest" (260 U. S. 512, post).

CARLETON et al. v. UNITED STATES
(U. S. Court of Claims, January 31, 1916)
(51 Ct. Cls. 60)

Record: Acts of June 13, 1898 and June 27, 1902. Suit to recover inheritance taxes paid. Petition dismissed.

Facts: The taxes assessed were on a bequest of $10,000 to Minnie A. Townsend, the income from which sum "shall be by said Minnie A. Townsend paid * * * to * * * Mrs. Augusta H. Worthen * * * as long as said Augusta H. Worthen shall live."

Question: Did the bequest give but a contingent beneficial interest to Minnie A. Townsend, so that the tax collected thereon should be refunded?

Decision: The court held that the possession and enjoyment of the fund took effect at once and said: "It is true that Minnie A. Townsend did not enjoy it at once, but immediately upon passing from the possession of the executors of the will the whole corpus of the legacy was in the possession and enjoyment of the beneficiaries named in the will; and that was all the requirement of the war revenue act to make it subject to taxation. * * * If the contention of the complainant is sound, then in order to make any legacy in the will taxable under the war revenue act, it would be necessary for the whole corpus of the same to rest in the possession or enjoyment of one person at once. That is not the language of the law. So far as applicable to this case, it is an inheritance tax pure and simple, and in order to make a legacy taxable under it, it is

only necessary that it should pass out of the hands of the executors into the possession and enjoyment of the legatee or legatees named, subject to no contingency or reservation.''

CARNILL v. LEDERER

(U. S. District Court, E. D. Pennsylvania, May 16, 1924)
(298 Fed. 462)

Record: Suit to recover additional income tax assessed for the year 1916. Verdict and judgment for defendant. Motion for a new trial denied.

Facts: On March 1, 1913, Carnill was the owner of 101 shares of the par value of $100 each of the capital stock of Hill Oil & Gas Company, incorporated in 1907 with an authorized capital stock of $20,000. In June, 1914, the authorized capital stock was increased to $80,000, the additional stock being distributed pro rata among the then stockholders so that Carnill became, without additional outlay, the owner of 404 shares. In 1916, the entire capital stock of the company was sold for $12,000,000 and Carnill received for his 404 shares $6,060,000. In his income tax return for the year 1916, he placed the value of his shares on March 1, 1913, at $5,050,000 and stated in his return a profit of $1,010,000 upon the sale. The Commissioner fixed that value as $430,765 and assessed him further with interest at the rate of 1 per cent a month from January 2, 1919, to December 27, 1919, amounting to $75,093.51. Plaintiff having duly claimed abatement and refund, which were refused, brought this suit to recover the additional tax paid, with interest.

There being no evidence of sales of the stock, evidence was introduced on both sides to show its value by proving the value of the property of the company as of March 1, 1913. The jury were instructed to bring in special verdicts and in answer to questions they fixed the fair market price or value of Carnill's stock on March 1, 1913, at $430,765. Plaintiff had offered to prove the corporation's expenditures in development of the property between March 1, 1913, and the date of the sale, and there was also introduced in evidence a balance sheet taken from the books of the company as of March 1, 1913, and the company's income tax returns for 1912 and

1913. This opinion was taken up with a consideration of reasons assigned in a motion for a new trial.

Questions: (1) Should evidence have been admitted to show the company's expenditures in the development of its property between March 1, 1913, and the date of the sale?

(2) Was it proper to admit in evidence the trial balance sheet taken from the books of the company as of March 1, 1913, and the company's income tax returns for 1912 and 1913?

Decision: (1) "The seventh reason is based upon the rejection of the plaintiff's offer to prove that large sum of money had been expended by the company in the development of the property between March 1, 1913, and 1916, the date of sale of the capital stock. The insistence upon this reason for a new trial is based upon a misconception of the real issue in the case. While, in the absence of evidence as to sales of stock, it was competent to prove value of the stock by showing the value of the company's property as of March 1, 1913, that evidence would have no relevancy to prove the value of the stock at the time of the sale. That value was fixed by the price at which it was sold, regardless of what had been expended by the corporation meanwhile. If the corporation were the plaintiff, and the fact to be proved was the difference between the value of property sold by it in 1916 and its value as of March 1, 1913, evidence of capital expenditures made upon the property after March 1, 1913, would be relevant, because such expenditures for betterments would enhance the value and the price paid, and would, therefore, be added to the value on March 1, 1913, thereby reducing the taxable profit or income. When Carnill sold his stock, however, he had no interest in the question of any outlay made by the company in the meantime. He received the price for his stock, and his relations with the company came to an end."

(2) "The twelfth reason is based upon the admission of a trial balance sheet taken from the books of the company as of March 1, 1913. It was made up by Revenue Agent Kelley, a witness, with the approval of the plaintiff's secretary, who was acting at the direction of, and under the authority of, the plaintiff. As this balance sheet was made with the plaintiff's knowledge and consent, and under his authority, it was in the nature of an admission

against interest, and had a bearing upon the plaintiff's knowledge of the value of the oil company's property as shown by its books.

"The thirteenth reason is based upon the admission under objection of the oil company's income tax return for 1912 and 1913. These were clearly evidential, to show the estimates of value placed upon its property by the company's officers."

The court considered the evidence against plaintiff's contention concerning value overwhelming and the motion for a new trial was denied.

CARTAN & JEFFREY CO. v. ALLEN, COLLECTOR

(U. S. District Court, D. Nebraska, Omaha Division, July 23, 1924)

(Not yet reported)

Record: Section 209, Revenue Act of 1917. Suit for recovery of tax paid under protest. Judgment for plaintiff.

Facts: Plaintiffs were engaged in the commission brokerage business but did a further business, which was considerable in amount but small as compared to the total business. This further business consisted of certain transactions for their customers, involving the advance of salesmen's expense accounts and the completion of the filling of cars for shipment by the purchase of additional merchandise for which orders had not been obtained as yet, the effort being made to sell while in transit or after a brief storage.

Question: Was this additional business merely incidental or did it determine the classification of the business as one requiring an invested capital or more than a nominal capital?

Decision: "Now, when you consider that the total volume of stuff bought and sold ran up into millions, and that the total volume of this latter kind was only $150,000, even though that small business did involve them in the use of a pretty heavy amount of what might be called capital, it seems to me that that was simply incidental to their business. * * * I am satisfied that it was their intention to stick right to the business of agents and brokers," and that their business was one that did not require and did not use any substantial capital compared to the value of the skill and energy and personality that were engaged, but a merely nominal capital,

and that, while there were some other transactions, "they were incidental, merely casual, fortuitous, and ought not to stamp the business as a whole with the character of these occasional, incidental, comparatively small, very small, transactions that were engaged in.

"I think the plaintiff here was taxable only as commission men and brokers using no capital or merely nominal capital in the business."

The judge said he was satisfied there was no good will that had been capitalized or that ought to affect the classification of the company; notwithstanding the fact that there had been certain sales of stock to a partner, the latter being allowed to pay for it out of the profits of the business, "giving it up if he goes out of business; not putting a real value on it in the sense of attempting to capitalize any good will or anything of that sort, but just a way of giving a percentage of business to a new partner or a new associate who comes in."

Judgment was entered for the plaintiff.

CARY v. CURTIS

(U. S. Supreme Court, December Term, 1844)
(3 How. 236)

Record: Certificate of division of opinion by the judges of the Circuit Court for the Southern District of New York upon the question whether the Act of March 3, 1839, was a bar to an action against a collector of customs for money illegally exacted by him as and for duties and paid under protest, the collector having paid them into the Treasury before action brought. Answer given.

Facts: The statute provided that moneys paid to a collector of customs for unascertained duties or for duties paid under protest should be placed to the credit of the Treasurer of the United States and kept and disbursed as all other moneys paid for duties and that whenever it should be shown to the satisfaction of the Secretary of the Treasury that in such a case more money had been paid than the law required, it should be his duty to issue his warrant therefor.

Question: Under the statute in question, is the collector subject to a suit as for money had and received, etc., in the case of a tax paid him under protest?

Decision: The court said that this section left the collector with no lien upon, or discretion over, the sums received by him and he was the mere bearer of those sums to the Treasury. Defendant in error contended the statute gave the right of action against the collector for duties paid under protest, leaving a party who has overpaid unascertained and estimated duties, no remedy but that of resorting to the Secretary of the Treasury. The court said there was no reason for such diversity and held that as the taxpayer had notice of the statute payment to the collector was in legal effect payment into the Treasury; that as the collector, "since the statute had power neither to retain nor refund, there could, as between him and the plaintiff, arise no privity nor implication on which to found the promise raised by the law, only where an obligation to undertake or promise exists; and that, therefore, the action for money had and received could not, in this case, be maintained, but was barred by the Act of Congress of 1839."

CASEY, COLLECTOR, v. STERLING CIDER COMPANY

(U. S. Circuit Court of Appeals, First Cir., December 21, 1923)
(294 Fed. 426)

Record: Section 628 (a), Revenue Act of 1918, and Article 13, Regulations 52. Action to recover a tax paid. Judgment for plaintiff. Writ of error. Affirmed.

Facts: The tax was upon sales in 1919 of sweet cider. Plaintiff duly claimed refund and on denial appealed to the Commissioner. After rejection, this suit was brought. In the trial court it was found and ruled that sweet cider was not taxable as a soft drink under the sections named and judgment was entered for plaintiff. Defendant took a writ of error. By said Section 628, there was levied on certain beverages sold by the manufacturer, etc., a tax of 15 per cent; "and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum

of the price for which so sold; and (b) upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 2 cents per gallon.''

Questions: (1) Is sweet cider taxable as a soft drink under Section 628?

(2) May Congress be considered as having re-enacted the former statute under which the regulations had taxed sweet cider as a soft drink?

Decision: (1) The court decided that sweet cider was not taxable as a soft drink under said section and that Article 13 of Regulations 52 was inconsistent with the statute in including ''sweet cider,'' following the decision in Monroe Cider Vinegar & Fruit Co. v. Riordan, 280 Fed. 624 (post). The court stated that it was in full agreement with the conclusions reached in that case and considered it unnecessary to restate them. ''We will, however, say that it seems to us that a further reason for the conclusion there reached in the construction of Section 628 (a) might be stated. It will be noted that in the section 'unfermented grape juice' is specifically named as an article subject to the tax, and, that following it, the articles 'ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks' are named. Because the enumerated articles that follow 'unfermented grape juice' are confessedly soft drinks, it is contended that unfermented grape juice is likewise a soft drink; that grape juice being the expressed juice of the grape and a soft drink, sweet cider, which is the expressed juice of the apple, is also a soft drink and included within the words 'and other soft drinks.' But unfermented grape juice, as such and in its natural state, is not drunk as sweet cider is in its natural state. Unfermented grape juice is commonly drunk when water or water and sugar are added, and when so used is a compounded or mixed drink. When so used, it undoubtedly becomes a soft drink. That unfermented grape juice becomes a soft drink when water or water and sugar are added is specifically recognized in Section 602 (b) of the Revenue Act of 1921, where it is classed as an 'unfermented fruit juice,' which in its 'natural * * *

form' is not used as a beverage but is 'intended for consumption as a beverage with the addition of water or water and sugar.' Although unfermented grape juice, as such, is taxable under the Act of 1918, it cannot properly be classed with ginger ale, root beer, sarsaparilla, pop, etc., as a soft drink, or be said to be referred to as belonging to that class by the words 'and other soft drinks.' This being so, it is plain that sweet cider, a natural fruit juice—not a mixed drink—was not intended to be included in the term 'and other soft drinks' as used in Section 628 (a)."

(2) The Collector argued that this was practically a re-enactment of Section 313 (b) of the Revenue Act of 1917, which had been construed in the regulations as including sweet cider and that Congress was familiar with this regulation and the enactment evidenced its intention to make sweet cider taxable thereunder. The court said that "we do not regard Section 628 (a) as a re-enactment of Section 313 (b) without substantial change. Then again we cannot, on the facts in this case, assume that Congress knew of and considered Regulation 44 as stating the true construction of Section 313 (b). The regulation had not been in existence for any considerable length of time when Section 628 (a) was enacted, and there is nothing to show that it had been consistently enforced and acquiesced in even during that length of time, so that it would be likely to have been known to Congress. The time that elapsed between the promulgation of the regulation and the enactment of the Revenue Act of 1918, of which Section 628 (a) was a very small part, was only about nine months, and the Act was undoubtedly drafted and introduced long prior to its final adoption. Furthermore, counsel for the defendant has presented photostatic copies of letters coming from the office of the Commissioner of Internal Revenue in the Treasury Department, written in October, 1917, and September, 1918, before and after the promulgation of Regulation 44, stating that sweet cider was not taxable under the Act of 1917; and he further states, without contradiction, that, while the regulation may have been enforced in some places, it was not generally throughout the country; all of which indicates that there was no uniform enforcement of or general acquiescence in the regulation as the true construction of Section 313 (b)."

CATHERWOOD v. UNITED STATES

(U. S. Circuit Court of Appeals, Third Cir., August 3, 1923)
(291 Fed. 560)

Record: Revenue Act of 1918. Suit for the recovery of taxes. Judgment of the District Court for the Eastern District of Pennsylvania for the defendant (280 Fed. 241, ante 858) affirmed.

Facts: Emma R. Catherwood died August 22, 1920. On February 25, 1921, the plaintiff, as executor, filed a return of income received by the decedent for the period January 1, 1920, to August 22, 1920. He also filed income tax return as executor for income received by the estate for the period August 23, 1920, to December 31, 1920, showing no taxable income of the estate. He also filed an estate tax return and paid the tax assessed thereon. Subsequently the plaintiff filed a claim for refund of the income of the decedent for the period January 1, 1920, to August 22, 1920. The basis of the claim was that the estate tax paid was deductible from the gross income of the decedent during her lifetime under the provisions of Section 214 (a) (3) of the Revenue Act of 1918.

Question: Was the estate tax deductible in determining net income of the decedent for the period January 1, 1920, to August 22, 1920?

Decision: Section 214 (a) provides that in computing net income there shall be allowed as deductions taxes paid or accrued within the taxable year imposed by the authority of the United States, except income, war profits and excess profits taxes.

"The estate tax, which by Section 401 of the Act is 'imposed upon the transfer of the net estate of every decedent dying after the passage of this Act,' is obviously not a tax that could have been 'paid' by Emma R. Catherwood, or that could have 'accrued within the taxable year' had she lived to file her own return, for such a tax can neither accrue nor be paid until death. So, had Emma R. Catherwood lived, she would not have been affected by, nor could she have deducted, an estate tax."

In United States v. Woodward, 256 U. S. 632 (ante 580), it was held that the estate tax was a proper deduction to be made in a return by the executor of income he had received in the taxable year after the decedent's death and during the settlement of the estate.

"If the estate tax 'accrued' when 'due' in 1921, it did not accrue within the 'taxable year' of 1920, and was not, in any line of reasoning, deductible in either tax return. If it 'accrued' when 'imposed' in 1920, then it 'accrued within the taxable year,' within the meaning of Section 214 and was, under the decision in the Woodward Case, a proper deduction to be made by the executor in ascertaining taxable net income from gross coming into his hands 'during the period of administration or settlement of the estate'."

"Assuming without deciding that the estate tax 'accrued' within 'the taxable year' of 1920, it does not follow that it may be deducted at pleasure from income received by different persons at different times during that year. It is, from its very nature, deductible only from income received after the tax has, following death, come into existence, not on the theory that it is payable out of a segregated part of the estate, for it is not, * * * but because the deduction, not being available to the decedent had she lived, is not available to her personal representative when making a return for her of income she had received when living—a return clearly different from the one an executor is required to make for income received by himself during the settlement of the estate."

CENTRAL NATIONAL BANK v. UNITED STATES

(U. S. Supreme Court, December 8, 1890)
(137 U. S. 355)

Record: Act of June 30, 1864, as amended July 13, 1866, Section 120. Suit for taxes. Judgment for defendant (15 Fed. 223). On writ of error the Circuit Court reversed the judgment (24 Fed. 577). Affirmed by the Supreme Court, on a further writ of error.

Facts: Action was brought by the United States for taxes on profits from business of the bank for the years 1866 to 1870, inclusive. Demurrer to answer was overruled (10 Fed. 612) and the Government amended, proceeding upon the ground that the bank in each of the said years declared dividends and added amounts to its surplus for which no return was made and no tax paid. The bank contended that the aggregate of certain amounts deducted from the dividends to the stockholders for payment of a

tax to the state should not be included in the return of dividends to the United States. This state tax was a tax on the stockholders, the bank simply acting as agent to collect. It was later discovered that the cashier had embezzled in each of those years a large amount and the declaration of the dividends and the additions to the surplus were made without knowledge of these embezzlements.

Questions: (1) Should the amount deducted from each stockholder's dividend for the state tax against him on such dividend be returned as a part of the dividend paid by the bank?

(2) Were the dividends and additions to surplus taxable, although it was later discovered that the cashier had embezzled large sums in each of those years?

Decision: (1) "The taxes constituted a claim against stockholders only, and the bank was made simply an agent to collect them for the state. Their retention by the bank out of dividends declared due to stockholders was a convenient mode adopted by the state to collect its taxes. * * * For these reasons, the bank had no right to omit from its return a statement of the sums retained by it for the state out of dividends to stockholders * * *."

(2) The liability of the bank depended solely upon the question whether dividends were in fact declared and amounts added to the surplus. "Whether or not such dividends should be declared, or such additions made, was for the bank to determine. In view of the language and object of the statute, we hold that, if the declarations or additions were not recalled or rescinded before the time when it became the duty of the bank to make its returns to the assessor, the question whether or not, for the purposes of taxation by the United States, dividends had been declared due to stockholders, or additions made to surplus or contingent funds, was closed, and the liability of the bank for the tax of 5 per cent on such dividends or additions attached. If the bank, in good faith, and by mistake, made a declaration of dividends, or an addition to its surplus or contingent funds, when it was not in a condition to do so, the mistake can not be corrected by the courts in an action brought to recover the tax. Relief must come from another branch of the Government."

CENTRAL RAILROAD AND BANKING CO. v. GEORGIA

(U. S. Supreme Court, October, 1875)

(92 U. S. 665)

Record: Writ of error to the Supreme Court of Georgia, to review affirmance of order of Superior Court, holding certain taxes legal. The suit was originally brought by the Company, in the mode required by the state statute to resist the exaction of this tax. Reversed and remanded.

Facts: The charter granted the Central Railroad and Banking Company by the State of Georgia provided that the company should not be subject to taxation in excess of ½ of 1 per cent upon its annual net income. The charter granted by that state to the Macon and Western Railroad contained no exemption. The latter company had one-half as much stock as the former. In 1872, the legislature authorized the consolidation of the two companies under the name and charter of the Central Railroad and Banking Company. In 1874, the legislature amended the tax laws of the state so far as the same related to railroad companies and repealed "so much of the charters of such companies respectively, as may conflict with the provisions of this act." The tax was assessed against plaintiff pursuant to this act. It paid the tax of ½ of 1 per cent required by prior law and instituted proceedings to resist the exaction of the further tax required. The state courts held that the consolidation of the two railroad companies resulted in the relinquishment of both original charters, including certain exemption from taxation. The case was carried to the Supreme Court of the United States.

Question: Did the company have a contract with the state which would be violated by the imposition of a tax in excess of ½ of 1 per cent upon its annual net income?

Decision: It was conceded that such a contract was granted by the charter originally issued to the Central Railroad and Banking Company, but it was claimed that such charter was surrendered and that another corporation was formed at the time of the consolidation. If in the statute authorizing the consolidation there is no grant of corporate powers, then no new corporation could be formed, as a grant of corporate existence is never implied. In the present

case, the consolidation was to be under the name and charter of the Central Company in such a manner that the shareholders of the other company, on the surrender of their shares of stock therein, should receive an equal number of shares of stock as a shareholder in the Central Company; there was to be no surrender of stock in the Central Company; if that company's charter had gone out of existence, the stockholders were afterward shareholders in no company; and the consolidation act provided that after consolidation the capital stock of the Central Company should not exceed "the authorized capital thereof" and the present authorized capital of the other company. Furthermore, a subsequent act of the legislature provided in its preamble that whereas the consolidation under the name and charter of the Central Company had largely increased the "capital stock and the number of stockholders" of that company, etc. The court held that the Central Company's charter had not been surrendered and that the contract limiting its taxation was in existence; but that as to the other company there never was such a contract; and that as at the time of this case, two-thirds of the company's stock represented the original stock of the Central Company and one-third the original stock of the other company, therefore two-thirds of the amount of the stock at that time was protected by a contract from taxation beyond the ½ of 1 per cent rate, while the remaining one-third was not so protected.

CENTRAL RAILROAD COMPANY v. DUFFY, COLLECTOR

(U. S. Circuit Court of Appeals, Third Cir., May 3, 1923)
(289 Fed. 354)

Record: Article 140 of Regulations 33 and Section 12, Act of 1916. Plaintiff brought suit for recovery of taxes collected. Judgment for plaintiff. Writ of error. Affirmed. (Certiorari granted, 263 U. S. 693.)

Facts: Complainant incurred certain expenses for additions and betterments to leased railroads, etc., constituting part of the rental which it had agreed to pay. The statute provided that in ascertaining the net income received within the year, there should be deducted the ordinary and necessary expenses paid within the

year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property of which the corporation has not taken or is not taking title, or in which it has no equity. The regulation provided that the cost of erecting permanent improvements on the ground leased is an additional rental and a proper deduction from the gross income if such improvements revert to the owner of the ground at the expiration of the lease, but that in such case "the cost will be prorated according to the number of years constituting the term of the lease and the annual deduction will be an aliquot part of such cost."

Question: Is the regulation that these expenditures, constituting additional rental, be prorated in each case according to the number of years constituting the term of the lease and that an aliquot part be deducted annually, inconsistent with the express provisions of the statute?

Decision: "The statute expressly provides that all such rentals 'paid within the year' may be deducted 'from the gross amount of income received within the year' in order to ascertain the net income to be taxed. The evident intention of the statute is that the deduction of such rentals shall be made from the gross income '*within the year*' in which they were paid. * * * That part of the regulations providing that only an aliquot part of such rentals shall be deducted each year during the life of the lease, we think, is inconsistent with the plain provisions of the statute and therefore the decree of the District Court is affirmed." The court cites McCoach v. Minehill Railway Company, 228 U. S. 295, and Gould v. Gould, 245 U. S. 151 (ante 339 and 237, respectively).

CENTRAL TRUST CO. v. COLUMBUS H. V. & T. RY. CO. et al.
(U. S. Circuit Court, S. D. Ohio, E. D., March 21, 1899)
(92 Fed. 919)

Record: Stamp Tax, Act of 1898. Question submitted in an action of foreclosure of a mortgage on railroad property. Instructions given to the master.

Facts: The statute provided for a 50c stamp when the "consideration or value exceeds $100, and does not exceed $500," etc.

The question was presented whether masters in executing a deed in accordance with a decree of confirmation of the court should place upon the instrument stamps according to the total value of the property, including mortgages, or only according to the value of the equity conveyed.

Question: Under the Revenue Act of 1898, should stamps be affixed to deeds in accordance with the total value of encumbered property or only in accordance with the value of the equity conveyed?

Decision: The "consideration" is the consideration for the conveyance and the "value" is the value of the thing conveyed, that is, the equity of redemption in the case of encumbered property, and the amount of the stamp should be proportioned to the value of the equity of redemption and not be based upon the entire value of the lands.

CENTRAL UNION TRUST CO. v. EDWARDS, COLLECTOR

(U. S. Circuit Court of Appeals, Second Cir., January 8, 1923)
(287 Fed. 324)

Record: Section 407, Revenue Act of 1916. Suit to recover part of capital stock tax. Judgment for collector (282 Fed. 1008, ante 860). Writ of error. Affirmed. (Certiorari denied, 262 U. S. 744.)

Facts: Tax was assessed upon facts as follows: Plaintiff's capital stock, par, $5,000,000; its surplus $15,000,000; its average undivided profits, about $2,000,000; each share, par $100, book value over $400 and average market price for the preceding year $788.75. For five years preceding return, dividends of not less than 50 per cent per annum had been declared. Good will was not carried as an asset. Plaintiff contended basis for taxation should be aggregate of outstanding capital stock, surplus and average undivided profits, less statutory deductions.

Question: In measuring the fair value of capital stock for the capital stock tax, should account be taken only of tangible assets or should there be considered also market value of stock, good will, good management and established capacity for earning profit?

Decision: The court referred to the valuation of capital stock according to the rules laid down in several decisions, among them, Anderson v. Farmers' Loan and Trust Co., 241 Fed. 322 (ante 72), and Leather Manufacturers' National Bank v. Treat, 128 Fed. 262 (ante 918). "But when the statute speaks of 'estimating' capital stock, and of arriving at the 'fair *average* value' thereof for a year, the words are so inappropriate to the process of transcribing book values, that an inference is irresistible of some other process being within the legislative intent."

The remarks made by the Committee Chairman in charge of the bill "satisfy us that the act was passed with the intent of permitting and indeed compelling the assessor to consider not only paid-in capital, surplus and undivided profits, but earnings and market value of shares. Such a method of assessment necessarily implies for the words 'capital stock' an enlarged meaning," regarding as "fair" an examination of "the entire potentiality of the corporation to profit by the exercise of its corporate franchise."

CHANLER v. KELSEY
(U. S. Supreme Court, April 15, 1907)
(205 U. S. 466)

Record: New York Transfer Tax Law of 1897. Writ of error to review a decision of the Court of Appeals of New York, sustaining an order of the Surrogate's Court imposing the transfer tax. Affirmed.

Facts: William B. Astor deeded certain property, on the marriage of his daughter, to trustees, etc., the income to be paid her during her life with remainder to others, subject to a power given to her to appoint by will, etc., the persons who should take after her death. By her will, she exercised the power of appointment. The Surrogate's Court held such exercise of the power to be a taxable transfer. The case was taken to the appellate division of the Supreme Court, which held the act imposing the tax to be unconstitutional. The Court of Appeals reversed the latter decision, sustaining the right to impose the transfer tax.

Questions: (1) Does the imposition of this tax result in the taking of the property of the beneficiaries without due process of law, in violation of the 14th amendment?

(2) Does such taxation violate the obligation of a contract, protected by Section 10, Article 1 of the Constitution?

Decision: (1) The objection that the property is taken without due process of law is based upon the argument that the estate in remainder was derived from the deeds of the grantor of the power and not under the exercise of the power. Under the common law an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which conferred the power and the beneficiary takes under the original grant. The argument is that the estate which arose by the exercise of the power came from Astor and not from his daughter, and was vested long before the passage of the statute under the authority of which the tax was imposed and the taxing of the power therefore was to take property without due process of law. "Notwithstanding the common law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title." By statute in England, for the purpose of taxation, it has been provided that the donee of a power should be regarded, in case of a general power, as the one from whom the estate came. The statute of New York "affects an estate which only became complete by the exercise of a power subsequent to its enactment. * * * The Court of Appeals of New York had the exclusive right to construe instruments of title in that state, and determine for itself the creation and vesting of estates through wills under the laws of the state." Its conclusion is binding upon the Supreme Court of the United States insofar as it involves a construction of the will and of the statutes, and in a prior case the court of appeals had held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. The court held that it was the exercise of the power of appointment by the will of the daughter which was the essential thing to transfer the estates upon which the tax was imposed, and that property was not taken without due process of law by the imposition of the tax.

(2) It was argued that contract rights were violated because instead of disposing of the entire estate, 95 per cent of the property included in the power was transferred and 5 per cent was taken by

the state, "but as there was a valid exercise of the taxing power of the state we think the imposition of such a tax violated no contract because it resulted in the reduction of the estate."

CHAPIN v. IRWIN, COLLECTOR

(U. S. District Court, N. D. New York, July 29, 1921)
(Not reported)

Record: Action to recover the amount of additional income tax assessed for the years 1914, 1915 and 1916, through the disallowance of deductions from gross income. Verdict and judgment for plaintiff as to part and for defendant as to part.

Facts: This was a companion case to Fish v. Irwin (ante 216), and the issues were practically the same. Chapin conducted two farms. Questions were submitted to a jury as to whether he was engaged in a business and as to whether the expenses incurred there were necessary in carrying on the business. In addition to these questions, it appeared that he had an office in New York City where he went to receive his mail. He contended that he operated his farms through this office and that the expenses thereof were deductible business expenses. The collector objected on the ground that as Chapin had no regular business the office was unnecessary.

Question: Was Chapin running a regular business at each of his two farms and at his office, and might he properly deduct the expenses thereof?

Decision: The jury found that he was running a regular business at one farm, the expenses on which, however, were not necessary. "The only reason for this could have been that while they considered the plaintiff engaged in carrying on a business at Towners, they also considered the expenses to be so gross and unreasonable as not to be necessary."

Upon the question as to the other farm, the court sustained the verdict of the jury that Chapin was merely a gentleman farmer running the place as a forest preserve for his own pleasure, and not as a business.

"He testified that he operated his farms through the office in New York City, and questions were submitted to the jury as to whether or not he was engaged in a business in New York City

and whether the expenses were necessary and both questions were answered in the affirmative and sustained in the finding by the court.'' The office expenses were, therefore, held necessary expenses of a business.

''As the Fish and Chapin cases were the first of their kind in the United States courts, so far as is known, it was decided to try them upon stipulation of sending various questions to the jury as to whether or not a certain venture was a business and also if they found in the affirmative, whether the expenses were necessary. The court was to be left the sole arbitrator as to whether or not the special findings were to be sustained, and then to render a verdict as if sitting without a jury as in an equity case.''

CHICAGO, B. & Q. R. CO. v. PAGE

(U. S. Circuit Court, N. D. Illinois, August, 1864)
(Fed. Cas. 2,668)

Record: Section 81, Revenue Act of July 1, 1862. Bill to prevent the collection by seizure, distress, or otherwise, of a tax. Decision against taxability.

Facts: The company operated a railroad in Illinois. For the purpose of aiding another railroad and to obtain for itself a connection with the Mississippi River at Burlington it advanced certain sums of money on mortgages to the other company. The latter became insolvent, and the plaintiff bought the road on foreclosure. For about seven years but one dividend had been distributed to complainant's stockholders, its earnings having been used to aid in making the advances mentioned. On an account being taken, it was found that over $900,000 of its earnings had been so advanced, and thereupon a stock certificate was issued to each of the stockholders, showing the pro rata amount of the earnings which had been advanced, the same being about 20 per cent to each stockholder on the original amount of stock held. The certificate was to the effect that the holder was entitled to so many shares of the full-paid stock of the company—thus turning the property which had been acquired for the advances made, into capital stock of the company. The collector demanded 3 per cent of this amount as a tax, claiming that the issuance of these certificates constituted a dividend in

scrip under the statute. Section 81 of the Act provided that on and after that date "all dividends in scrip, or money * * * thereafter declared due or payable to stockholders of any railroad company, as part of the earnings * * * shall be subject to and pay a duty of 3 per centum" and the company was authorized to withhold this from the dividends paid.

Question: Was this a dividend in scrip so as to be taxable under the statute?

Decision: The court said that while a part of the expenditures used in acquiring the other road were from earnings, yet such outlays were made before the passage of the act. "These profits and earnings had then actually been disbursed for them [the stockholders] and they were held as a part of the general property or assets of the company. When the company enforced its lien by a sale the property and assets, in part purchased with the earnings of the road, did not produce the money which had been paid for them, but the company took in their place that part of the * * * railroad extending from Peoria to Burlington * * *. Its value * * * was estimated at its cost and a stock certificate was issued, showing the amount which each stockholder had contributed toward the purchase.

"We think in no just sense can this be considered a dividend. It was not intended or treated as such by the company. It is true that it is not necessary the division should be of money but the act clearly contemplates that when it is in scrip, it shall be of a character to be paid—and the payment of which can be deducted and withheld from the stockholders by the managers of the railroad—and that it shall be due and payable. Apply these tests to this property and it will be seen the facts will not warrant the right claimed. Before the sale it could be regarded only as a loan or purchase made; after, as a bona fide title acquired in the property by the company—consequently by all the stockholders—and not as something due and payable to them."

"We think * * * the certificates of stock cannot be regarded as a dividend declared due and payable to the stockholders in November, 1862. The company and the stockholders treated that part of the property acquired with these earnings as capital

stock, and it cannot be at the same time stock added to the capital and a dividend.''

The court did not consider the question of its right to interfere and arrest the collection of the tax, but said that might be considered later, if necessary. The opinion was rendered because of the expressed desire of both parties.

CHILE COPPER COMPANY v. EDWARDS, COLLECTOR

(U. S. District Court, S. D. New York, November 14, 1923)
(294 Fed. 581)

Record: Revenue Act of 1916. Suit to recover a capital stock tax paid. Judgment for plaintiff.

Facts: The Chile Copper Company is a holding company organized to hold the stock of the Chile Exploration Company, which mines and sells copper, and to invest the latter's funds in call loans. It has done both things. The laws of Chile provided that mining property could not be sold for debt, so the copper company was organized, holding the stock of the exploration company and pledging it for loans. The latter company had paid the capital stock tax.

Question: Was the plaintiff ''doing business'' within the meaning of the provision of the Act imposing the capital stock tax?

Decision: The plaintiff has been doing all that it was organized to do but this fact is not a test of whether it was ''doing business.'' The question is what it does and not what it can do. The term, ''business,'' means some profitable activity undertaken on its own account. There was such a business, but it was the mining and sale of copper, to which both corporations were necessary, owing to the state of the Chilean law. Of course, it is true that each was doing a part of that business, because financing was a necessity incident to its prosecution. But the excise does not exact a double tax for leave to do a single business, and the plaintiff was in substance no more than the personification of a part of the enterprise. As things are, the nearest approach to a separate business is the plaintiff's investment of its funds in call loans. Judgment for plaintiff was ordered as it was held not to be ''doing business'' under the statute.

CLAPP, COLLECTOR, v. MASON et al.

(U. S. Supreme Court, April 16, 1877)
(94 U. S. 589)

Record: Legacy tax of 1864 and repealing statute of July 14, 1870. Action to recover tax paid. Judgment for plaintiff. Affirmed on writ of error.

Facts: William P. Mason died December 4, 1867, willing real estate to his wife for life or until she should cease to reside on same, and then to plaintiff. The widow died June 17, 1872. Tax was assessed May 15, 1873, which was paid under protest. The taxing statute, the Act of 1864, was repealed by the Act of July 14, 1870, taking effect August 1, 1870, the repealing act providing for the continuance in force of all provisions for levying and collecting taxes accruing under former acts, "and this act should not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such act is hereby saved."

The collector insisted that the tax upon the succession in question had accrued before the repeal of the Act of 1864 and upon the death of the testator in 1867. The devisees contended that the tax did not accrue until they came into possession of the land, before which time the taxing statute was repealed.

Question: When did the right to this tax accrue, at the death of the testator or at the death of the widow?

Decision: The tax was imposed upon the "succession to real estate." The act provided that any disposition by will by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate upon the death of any person, shall be deemed to confer a succession. The court agreed to the argument that the will conveyed a taxable estate to plaintiffs and that although they were not entitled to immediate possession they had a vested estate and that estates not vested but merely in expectancy are within the statute, but said the question was: When is this vested estate taxable?

Section 137 provided that the tax should be paid at the time when the successor shall become entitled in possession to his suc-

cession or to the receipt of income or profits thereof. A later act provided that the tax became a lien on the succession "from the time when such taxes shall become due and payable," and the same statute required assessment of the tax within 30 days from the time the party becomes entitled to the possession of the estate. "In the case we are considering, the successor did not become entitled to the possession or enjoyment of the estate until the death of the widow, which occurred on the 17th day of June, 1872. The duty imposed extended only to successions accruing prior to August 1, 1870. The saving clause, therefore, does not reach the case."

CLARK v. SICKEL
FARNUM v. SICKEL
LEA v. LEEDS
SELLERS v. SICKEL

(U. S. Circuit Court, E. D. Pennsylvania, 1871)
(Fed. Cas. 2,862)

Record: Act of June 30, 1864. Actions at law raising the question as to the constitutionality of the Act of June 30, 1864, imposing an income tax. A demurrer was interposed, and judgment for the defendants was entered thereon.

Facts: The pleadings in all these cases raised the question whether the act in question, so far as it imposed an income tax, was within the power conferred by the constitution.

Question: Was the act unconstitutional as imposing a "capitation or other direct tax" requiring to be apportioned among the states?

Decision: The court said it was of the opinion that this was not a "capitation or other direct tax" in the sense in which the framers of the constitution and the people of the states who adopted it understood such taxes, but the reasons for the opinion were not given, "inasmuch as these cases will doubtless go to the Supreme Court for ultimate decision."

CLEMENT NATIONAL BANK v. VERMONT

(U. S. Supreme Court, November 10, 1913)
(231 U. S. 120)

Record: Statute of Vermont of 1906 taxing National Bank deposits. Judgment of Supreme Court of Vermont in favor of the state affirmed on writ of error.

Facts: The state taxed deposits in National Banks where the interest thereon exceeded two per cent per annum, at the rate of seven-twentieths of one percent semi-annually. The bank might, at its election, pay the state these taxes and deduct the payments from the depositor's interest or deposits. On such election it filed a stipulation to that effect. This suit was brought on such a stipulation, the returns and payments therein specified not having been made. The trial court gave judgment for the full amount claimed, but the state Supreme Court held the tax assessable as to depositors who were residents of the state only.

Questions: (1) Is the statute invalid as imposing a state tax on the franchises of a national bank?

(2) Does a state tax on interest-bearing deposits in national banks deny equal protection of the law, because of the exemption of noninterest-bearing accounts?

Decision: (1) The tax is not on the national bank, but on the depositors. The bank's liability is by virtue of its stipulation only.

(2) A state tax on interest-bearing deposits in national banks does not deny equal protection of the law on account of exemption which it is within the power of the state to allow or on account of the exemption of noninterest-bearing accounts. The classification is reasonable. Under its broad powers of classification for taxation, a state may classify depositors in national banks so long as the statute is not essentially inimical to such banks in frustrating the purpose of the legislation or impairing their efficiency as Federal agencies.

CLINKENBEARD et al. v. UNITED STATES

(U. S. Supreme Court, October, 1874)

(21 Wall. 65)

Record: Acts of July 13, 1866, and July 20, 1868. Action of debt by the Government to recover capacity tax of a distiller. Judgment for plaintiff. Reversed and remanded on writ of error.

Facts: Clinkenbeard operated a distillery and he and his bondsmen were sued under the Act of July 20, 1868, on account of an alleged breach of the bond because of a deficiency of tax, it being stated also that he had not paid the capacity tax. The statutes provided a tax on a deficiency and that in no case should the assessment be for a less quantity than 80 per cent of the producing capacity of the distillery. The time was to be counted from one hour after taking out his bond, and notice was to be given by him in case of a cessation of operations. A Government storekeeper was to be furnished for his warehouse. On the trial he offered to prove that for the first four days he could not begin operations because no storekeeper was furnished; that because of an accident the distillery was shut down another four days, during which time an officer of the Government was in charge, in accordance with the notice given, and that such time was included in the time for which the tax was assessed. This evidence was excluded. Another statute, being the Act of July 13, 1866, provided that no suit could be brought for the recovery of any tax alleged to have been erroneously or illegally assessed until an appeal had been made to the Commissioner.

Questions: (1) Was the offered evidence regarding the time when the distillery was not in operation properly excluded?

(2) Does the statute providing that no suit shall be brought to recover a tax until after an appeal to the Commissioner, prevent the setting up in defense to an action by the Government for the tax, of facts which might be deemed to justify such a suit?

Decision: (1) "The distiller, without any fault of his own, but by the omission of the Government itself, was prevented from operating his distillery for the first four days for which he was taxed, and his distillery was inactive from an accident, and in

charge of a Government officer, as prescribed by law, for four other days. He could not, without a breach of law, commence distilling till a storekeeper was assigned him, and he acted in compliance with the law when his distillery was stopped by accident. To charge him with the capacity tax during those eight days was unjust and oppressive.'' The offered evidence was improperly excluded.

(2) The decisions of the assessors ''are of a quasi judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the Government elects to resort to the aid of the courts it must abide by the legality of the tax. When it follows the statute its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs.'' The judgment was reversed and a new trial ordered.

CLIQUOT'S CHAMPAGNE

(U. S. Supreme Court, February 5, 1866)
(3 Wall. 114)

Record: Act of March 3, 1863. Action by Government for forfeiture of imports. Judgment for Government affirmed.

Facts: An attempt was made to escape various ad valorem taxes by making false invoices containing incomplete and untrue statements of the value of the goods.

Act of March 3, 1863, provided: ''If any owner, consignee or agent shall knowingly make an entry of goods, etc., by means of any false invoice, certificates, etc. * * * knowing that the invoice does not express their actual market value * * * , said goods shall be forfeited.''

A witness testified to statements of persons who said they were agents of the claimant, as to prices in Paris. This was objected to on the ground that the testimony was hearsay as there was no evidence of agency. There was admitted in evidence a price list fur-

nished by this alleged agent to the witness. The witness further testified that almost all the leading champagne manufacturers have agencies in Paris; that he inquired of several agencies for champagne at wholesale for exportation, and the agents uniformly stated to him their prices; that he could find no agents for Eugene Cliquot at Paris other than the persons who said they were agents as aforesaid; and that he was told at another wine dealer's establishment their wholesale prices and given a price list. The introduction of this price list was objected to as hearsay and irrelevant because the prices were those of a single bottle, because no transaction was based thereon, because the paper was in no way connected with the claimant and because the wines therein referred to did not appear to be the same in quality with those libeled. The testimony was as to the value of wines at Paris while the wines in question were imported from the northeastern part of France, near Rheims.

Questions: (1) What is admissible as evidence of value of imported goods?

(2) Are revenue laws to be construed as penal laws are construed?

Decision: (1) "If the proof of agency was insufficient an exception should have been taken upon that ground and the evidence upon the subject embodied in the bill. This was not done. It appears, however, that the proof was sufficient. Besides other evidence, the fact was proved by the deposition of Eugene Cliquot, the claimant."

The price list coming from the agent was admissible. Its weight and application depended upon the other evidence in the case, which is not shown. "We think the Price-Current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness, both of which were admissible * * *. It was clearly relevant. What effect it should have, in connection with the other evidence adduced by the parties, was a question for the jury."

Whether the wines named in the testimony were the same as those in question or not and to what extent they differed in quality

and price is not disclosed in the bill of exceptions. Any difference should have been made to appear by evidence or an admission of the trial judge.

"The term 'place,' as used in the first section of the act of 1863, does not mean any locality more limited than the country where the goods are bought or manufactured. The standard to be applied is their value in the principal markets of that country. The commerce into which they enter is international, and the language of the statute must be construed in a large and liberal spirit. Proof of the value of the wines at Paris, if there was no other evidence upon the subject, was sufficient to enable the jury to arrive at the proper conclusion."

"The term knowingly, in the act of 1863, in the connection here under consideration, refers to the guilty knowledge of the owner, consignee, or agent, by whom the entry is made, or attempted to be made. The offense to be punished consists of three particulars: (1) The making or attempting to make, an entry by the owner, consignee, or agent. (2) The use by such owner, consignee, or agent, of the forbidden means. (3) Guilty knowledge on the part of such owner, consignee, or agent."

The instructions given by the trial judge, in which the Supreme Court concurred, including the following: "The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade. You will perceive, therefore, that the actual cost of the goods is not the standard. On the contrary, that having been the standard, the law has been changed, and for the standard of the cost has been substituted another standard, to wit, the actual market value."

(2) "Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good."

COFFEY, COLLECTOR, et al. v. EXCHANGE BANK OF LENNOX

(U. S. Circuit Court of Appeals, 8th Cir., February 26, 1924)
(296 Fed. 807)

Record: Action for the recovery of taxes paid. Judgment for plaintiff. Reversed on writ of error.

Facts: The bank's complaint did not allege that any of its payments were made involuntarily under duress or under protest but that it had filed an amended return, stating that it had erroneously failed to claim a deduction of certain payments by it of state and county taxes and asking for the refund of these amounts, aggregating $341.67. This claim being rejected on appeal, suit was brought. Certain of the taxes were paid to Coffey while collector, and certain to defendant Mee while collector, but the suit was brought against both for the total amount. Each defendant demurred on the grounds, first, that the payments could not be recovered as they were voluntarily made, and second, as to certain counts, that neither could be sued for the recovery of payments made to the other. The demurrers were overruled and as the defendants declined to plead further, judgment was entered for the full amounts claimd, with interest and costs. A writ of error was sued out.

Questions: (1) May taxes be recovered from a collector other than the one to whom they were paid?

(2) May taxes voluntarily paid be recovered from the collector by suit?

Decision: (1) The court said that each defendant acted separately in the collection of the taxes and if plaintiff were entitled to judgment it could recover only from the collector to whom it made the payments. "In Patton v. Brady, Executrix, 184 U. S. 608 * * *, it was held that such an action against the collector survives his death, and his executor is the proper and only party to be substituted as the defendant, as an action is personal against the collector who received the tax. This is reaffirmed and the reasons therefor are fully set out in Smietanka v. Indiana Steel Co.," 257 U. S. 1 (ante 980).

(2) The court held that the law prevents a recovery in such an action against the collector if the tax was paid voluntarily, without coercion and without protest, citing Chesebrough v. United States, 192 U. S. 253 (ante 136) and United States v. New York & Cuba Mail S. S. Co., 200 U. S. 488 (ante 555).

"Had plaintiff instituted this action against the United States, whether under the Tucker Act or in the Court of Claims, and obtained a judgment, it could not have recovered interest or costs, while in the case at bar the judgment included both, as is permissible in actions against collectors.

"As held by the United States Circuit Court of Appeals for the Second Circuit in Fox v. Edwards, 287 Fed. 669, 672, 673, [post], prior to that enactment (referring to the Act of 1919) the commissioner of internal revenue had no authority to credit or refund overpayments of taxes, unless appeal was duly made to him in the manner prescribed by section 3220, Rev. St. Section 252 makes no reference to the collectors of internal revenue or actions against them. Nor does section 1316 of the Act of 1919 or section 1315 of the Act of 1921, apply to collectors. From what was there decided it follows that an action against a collector of internal revenue to recover excessive taxes, paid voluntarily, under no duress, and without protest, cannot be maintained, although such an action may be maintained against the United States, either under the Tucker Act * * * if the amount involved does not exceed $10,000, and in the Court of Claims regardless of the amount involved."

COMMISSIONERS OF SINKING FUND OF LOGAN COUNTY, KENTUCKY, et al. v. UNITED STATES

(U. S. Supreme Court, February 21, 1898)
(169 U. S. 255)

Record: Act of February 25, 1893, sections 3220, 3228, R. S., and section 121 of the Revenue Act of 1864. Suit to recover taxes. Denied in Court of Claims. Appealed. Affirmed.

Facts: The Commissioners petitioned in the Court of Claims for the refund of taxes paid by a corporation on its surplus on the ground that this reduced the amount of a subsequent stock divi-

dend to petitioner and was really a tax on such dividend, and as the claimant was a municipal corporation it could not be taxed. The Commissioner of Internal Revenue had audited and adjusted this claim but the Comptroller of the Treasury issued a warrant for but a fraction of the amount of the audit and adjustment. It was claimed that the action of the Commissioner of Internal Revenue was conclusive as an award having all the force of a judgment.

Questions: (1) Is an audit and adjustment made by the Commissioner under the Act of February 25, 1893, conclusive?

(2) Was this a tax against the corporation or was it a tax on the stock dividend?

(3) Does section 121 of the Revenue Act of 1864, in providing that when a dividend is made which includes any part of a surplus of a railroad company on which a duty has been paid such duty shall be deducted from the duty on the dividend, refer to a stock dividend?

Decision: (1) Such an allowance by the Commissioner of Internal Revenue is prima facie evidence only of the amount due and puts upon the Government the burden of showing fraud or mistake.

(2) At the time when the tax was paid "the full amount thereof was due the Government from the company itself, and not one penny could properly have been deducted from the amount of the tax by reason of the fact that a municipal corporation owned a certain amount of the stock of the company. * * * Taking all the facts as found by the court below, it appears that the only tax paid was paid on the undistributed surplus of the company while it remained such surplus in its hands and while it was a portion of its own property, as much so as anything else owned by it, and that thereafter the company declared a stock dividend of 40 per cent upon its old capital."

There is no finding that any tax was assessed on the stock dividend. The payment of a tax by a corporation on its surplus can not be regarded as a tax on a stock dividend later made, and if the amount of the tax be deducted from the subsequent stock dividend that would not render the payment of the tax improper even as to municipal corporations which may be stockholders. "* * *

where a railroad company pays a tax on its undistributed surplus, under the act of 1864, it is thereby paying a tax upon its own property, and * * * such payment cannot be regarded as a payment of the tax upon a stock dividend thereafter declared by the railroad company.''

(3) This statute includes only cash dividends.

COMMONWEALTH v. NORMAN

(Massachusetts Supreme Judicial Court, May 23, 1924)

(144 N. E. 66)

Record: Action in the Massachusetts Superior Court for the recovery of a state income tax. Petition of defendant granted for removal of the cause to the District Court. Plaintiff appealed. Order reversed.

Facts. The petition for removal alleged that Norman was a resident of Rhode Island; that he, both individually and as trustee under a will probated in Rhode Island had been unlawfully assessed a tax on income by the State of Massachusetts; that this was a confiscatory and unconstitutional enforcement of said law, in violation of the ''due process'' and ''equal protection'' clauses of the Fourteenth Amendment; and therefore that the action was the personal action of the Commissioner of Corporations and Taxation so that he and not the Commonwealth of Massachusetts was the real plaintiff.

Question: Is the action removable on the ground that it is between citizens of different states?

Decision: A state is not a citizen and diversity of citizenship cannot be predicated on an averment to that effect. Defendant alleges that the Commissioner and not the state is the real plaintiff. In the early decisions as to what is to be deemed a suit against a state, the question was whether the state was a party to the record, but now the question is as to the essential nature and effect of the proceeding as it appears from the entire record. This is an action to collect a tax under the state statutes, brought according to such statutes.

''The Commonwealth is named as party to this action. Its name alone is in the writ and caption. It is not a mere nominal

party. It is the real party in interest. No one else has any interest in the outcome of the action. It is difficult to conceive of any administrative or executive subject in which the Commonwealth is more deeply or more directly concerned than the collection of the income and other state taxes.'' The allegation that the tax cannot be lawfully collected has no relevancy to the question whether the Commonwealth is the sole party plaintiff. The order for removal was reversed.

CONCORD RAILROAD CORPORATION v. TOPLIFF, COLLECTOR

(U. S. Circuit Court, D. New Hampshire, October Term, 1874)
(Fed. Cas. 3093)

Record: Acts of March 2, 1867, and July 14, 1870. Assumpsit for the recovery of taxes paid. Plea of general issue. Judgment for defendant for costs.

Facts: Plaintiff declared a dividend of $78,947.37 out of the net earnings for six months ending March 31, 1870, payable May 2, 1870. The profits over the dividend for the same period were $3,934.13. On June 7, 1870, plaintiffs returned the dividends and the further profits. On June 15, 1870, a tax of 5 per cent thereon, aggregating $4,144.07 was assessed. This was later paid under threat of distraint and under protest, together with 5 per cent additional, $207.20, as penalty for nonpayment of the tax in June. Plaintiffs appealed from said assessment and collection to the Commissioner, asking for a refund, and the Commissioner rejected the claim. Plaintiffs demanded repayment, which was refused. The hearing in this case was had upon an agreed statement of facts. As to the earnings of the first three months of this period, in 1869, it was agreed that they were subject to taxation. As to the earnings of the first three months of 1870, plaintiffs contended that the tax was illegal as there was no authority of law for the assessment of taxes on dividends declared from earnings subsequent to 1869, on which the tax was not assessed before March 1, 1870. The Act of March 2, 1867, provided that the taxes on incomes therein imposed should be levied on March 1st and be due and payable on or before April 30 in each year ''until the year 1870

and no longer.'' The Act of July 14, 1870, provided that certain former taxing statutes, including the Act of March 2, 1867, should be ''construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further taxes shall be levied or assessed'' thereunder.

Question: Were the taxes legally assessed and collected?

Decision: After discussing prior taxing acts the court said: ''In looking through the legislation from 1862 to 1870, it is very obvious that in all the enactments since 1861 the income tax, properly so called, has been kept entirely distinct and separate from the taxation of bonds, dividends, and earnings of corporations. It has been assessed at a different time and in a different manner—the one, once a year; and the other, usually twice; always as often as a dividend was declared, and as often as once in six months. The one was upon the annual income of each year ending December 31st; and the other, whenever the dividend was declared. The one went usually into the annual list for collection, and the other into the monthly, but never into the annual, and the one is known and recognized in the statute as the income tax, or the tax on incomes, and the other never so.''

''It is contended that the tax on bonds, coupons, dividends and profits is an income tax, and so is within the provision that taxes on incomes should be assessed in March, 1870, and no longer. * * * But it is a sufficient answer to say that other provisions of the statute make it evident that the provision was intended to apply to the income tax proper, and that the tax on bonds, coupons, interest, dividends and profits of railroads and other corporations was not known or called a tax on incomes, and was assessed in an entirely different manner and time or times. Again, if the provisions of the act of 1867, that the taxes on incomes therein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April, in each year, until and including the year 1870, and no longer, applied to the tax on railroad dividends, and the bonds and profits of corporations, then, between 1867 and 1870, the tax on such dividends should have been levied in March, and collected in April of each year, instead of whenever the dividend was declared, or before the tenth day of the next month

thereafter. But such, it is believed, has never been the practice or understanding of the law.''

COOK v. TAIT, COLLECTOR

(U. S. Supreme Court, May 5, 1924)
(265 U. S. 47)

Record: Section 210, Revenue Act of 1921. Suit to recover tax paid under protest. Defendant's demurrer sustained, 286 Fed. 409. Writ of error. Affirmed.

Facts: Plaintiff was a native citizen of the United States. He took up his residence and became domiciled in the City of Mexico. On demand, he returned his income, which had been derived from his property in the City of Mexico. A tax was assessed and he paid the first installment under protest, and this suit was brought for its recovery. Defendant interposed a demurrer, which was sustained. A writ of error was taken to the Supreme Court.

Question: Does Congress have power to impose a tax on the income of a citizen who is permanently resident and domiciled in a foreign country, the income being from property located therein?

Decision: Plaintiff contended that the person receiving the income and the property from which he receives it must both be within the territorial limits of the United States to be within its taxing power. The court held this contention not justified. In affirming the judgment of the lower court, which held the income taxable, the court referred to the decision in United States v. Bennett, 232 U. S. 299, and said: ''The contention was rejected that a citizen's property without the limits of the United States derives no benefit from the United States. The contention, it was said, came from the confusion of thought in 'mistaking the scope and extent of the sovereign power of the United States as a nation and its relations to its citizens and their relation to it.' And that power in its scope and extent—it was decided, is 'based on the presumption that government by its very nature benefits the citizen and his property wherever found, and that opposition to it holds on to citizenship while it belittles and destroys its advantages and blessing by denying the possession by government of an essential power required to make citizenship completely beneficial.' In other words,

the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found, and therefore, has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country and the tax be legal—the government having power to impose the tax."

(The lower court had stated that citizens resident abroad may demand the protection of the United States in certain emergencies and that the Government is required to maintain diplomatic and consular representatives abroad and keep up land and sea forces partly for their benefit. "In easily conceivable cases the attempt to assert his rights may involve his country in the expenditure of billions of dollars and hundreds of thousands of lives. If he wishes to retain a citizenship which may cost his native land so dearly, it is not altogether unreasonable to require him to contribute to its support.")

CORBUS v. ALASKA TREADWELL GOLD MINING COMPANY

(U. S. Supreme Court, January 5, 1903)
(187 U. S. 455)

Record: Action in equity by a stockholder against the defendant corporation to prevent the payment of an Alaskan license tax. A demurrer was interposed which was sustained and the bill was dismissed. Plaintiff appealed to the Supreme Court. Decree of the District Court affirmed.

Facts: The bill alleged that the defendant was incorporated under the laws of Minnesota; that it was engaged in mining in Alaska; that the general control of its affairs was in a board of directors residing in San Francisco; that a general superintendent

had complete control of its affairs in Alaska; that the company, by said superintendent, intended to pay a license tax amounting to $1,875; that said tax was illegal; that the suit was not collusive nor brought to confer jurisdiction on the court; that the plaintiff was not able, because of the distance at which the directors resided, to request them to refuse to pay the tax but such request was made of the superintendent; that the company had determined to pay the tax; that such payment would diminish the assets of the company and its dividends and the value of its shares, involving more than $5,000; and that unless the company paid the tax or the court granted the relief asked then the company would be exposed to a multiplicity of suits and suffer irreparable injury, to the damage of the plaintiff. The trial court sustained a demurrer interposed and dismissed the bill. Plaintiff appealed.

Question: What is required of a stockholder before he may be permitted to sue to enjoin his company from paying a tax alleged to be illegal?

Decision: "Evidently the plaintiff patterned his proceeding upon Pollock v. Farmers Loan & Trust Co., 157 U. S. 429 [ante 408]. But that case does not determine to what extent a court of equity will permit a stockholder to maintain a suit nominally against the corporation but really for its benefit." The court quoted from another decision that before the shareholder is permitted in his own name to conduct a litigation which usually belonged to the corporation, " 'he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.' "

In the case being decided, the stockholder owned 100 of the 200,000 shares of the company and the payment of the total tax in question would amount to a charge upon plaintiff's interest of less than one dollar. The bill did not show that any of the other stockholders were objecting. After referring to the general rule that equity will not restrain the collection of a tax on the mere ground of its illegality and the requirement that payment must be made before inquiry as to the validity of a tax will be permitted, the court said: "Now before a court of equity will in any way help the party to thwart this intent of Congress, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury. No considerations of mere convenience are sufficient, and if the party promptly and directly charged with a tax is unable to make a case for the interference of a court of equity, no one subordinately and indirectly affected by the tax should be given relief unless he shows not merely irreparable injury to the tax debtor as well as to himself, but also that he has taken every essential preliminary step to justify his claim of a right to act in behalf of such tax debtor." As no demand had been made on the directors, as the company had not appeared by counsel in either brief or argument in the Supreme Court and as other facts indicated that the bringing of this suit was an "attempt to thwart in behalf of this corporation the obvious purpose of Congress, that a tax must be paid before its validity is challenged," the court said it was of opinion the District Court was right in dismissing the suit, and its action was affirmed.

CORKLE v. MAXWELL, COLLECTOR

(U. S. Circuit Court, S. D. New York, January 23, 1856)
(Fed. Cas. 3231)

Record: Act of August 6, 1846. Action at law in the New York Supreme Court against the collector to recover certain payments. Removed by defendant to the Federal Court. Judgment for defendant.

Facts: Plaintiff had his store designated for the storage of dutiable merchandise under the Act of August 6, 1846. Plaintiff executed a bond to indemnify the collector against loss which might

happen to any goods stored in his warehouse. The Secretary of the Treasury instructed all collectors to collect from the owners of such warehouses a monthly sum equivalent to the salary of an inspector, or, at their option, to pay monthly one-half the storage charges. Plaintiff elected to pay the salary, and this payment was made for some time, the money being turned into the Treasury. The payment for September, 1849, was made under protest, as was the payment for November, 1851, the latter stating that all payments had been made under compulsion and "we extend this protest to the present and all past and future similar exactions from us, and shall hold you and the Government responsible for them in damages, and submit to such exactions temporarily, only to continue in the use of said warehouse." This action was brought to recover such payments, the plaintiff claiming that there was no law authorizing the Government to make the collections and that the payments were not voluntary, but were made under such coercion that they could be recovered.

Question: Were the payments involuntary so they might be recovered?

Decision: Plaintiff had no right to keep a warehouse for the storage of dutiable goods by any provisions of the act but solely because of appointment by the Secretary of the Treasury. The continuance of such appointment was at the will of the Secretary. It was assumed for the purposes of argument that neither the Government nor the collector had any right to demand the sums paid. "But it is not every payment upon a demand which could not be enforced by law, that can be recovered back. If it was freely and voluntarily made, there can be no recovery back. But, when the payment has been obtained by fraud, or by oppression or extortion, or when it has been made to secure a right which the party paying was entitled to without such payment, and which right was withheld by the party receiving the payment until such payment was made, such payment was not voluntary and the money can be recovered back. And it may be said, that where the money was paid upon a wrongful demand, to save the party paying from some great or irreparable mischief or damage, from which he could not be saved, but by the payment of the sum wrongfully demanded, it can be re-

covered back. In the case in question, there was no fraud practiced by the defendant upon the plaintiff * * *. The defendant received the money honestly, and in obedience to instructions from the Secretary of the Treasury and paid the same over to the Treasury."

Therefore, the payments made were voluntary and "can not be recovered back, even though the Government, through its agent, the defendant, had no legal right to demand them." The court was of the opinion that the statute authorized the collections from the plaintiff.

CORNING & CO. v. UNITED STATES

(U. S. Court of Claims, February 13, 1899)
(34 Ct. Cls. 271)

Record: Section 3220 R. S. and Section 17 of the Act of May 28, 1880. Suit for recovery of internal revenue tax alleged to have been illegally exacted on the withdrawal of spirits from a bonded warehouse. Defendant's demurrer was sustained and the petition was dismissed.

Facts: Plaintiff was an Illinois corporation engaged in distilling. During 1892 it owned large quantities of spirits on which bond had been given in accordance with law to secure the payment of the internal revenue taxes. In December of that year, at the company's request, the Government regauged the liquors but afterward it was determined not to withdraw them at that time. Later the company made several requests for regauging, desiring to pay the tax and withdraw the spirits from the warehouse. The collector refused until the company agreed to pay the gaugers. Then the regauge was made, which established considerable loss by leakage, evaporation, etc., and the liquor was withdrawn from the warehouse. Plaintiffs offered to pay the tax according to the amount shown by the last regauge, but the collector required payment according to the number of gallons shown on the first regauging. This tax was paid under protest and the amount claimed illegally collected was $6,506.10. The Commissioner overruled the application for refund and this suit was brought. Defendant demurred to the petition on the ground it did not allege facts sufficient to estab-

lish a cause of action, the Commissioner of Internal Revenue, by Section 3220 R. S., having exclusive control of the matter. That section provides that the Commissioner is authorized, on appeal to him to remit, refund and pay back all taxes erroneously or illegally assessed or collected, penalties and unjust or excessive taxes, and Section 17 of the Act of May 28, 1880, provided for regauging, the taxes to be collected only on the actual amount withdrawn if there had been any loss "without default or negligence of the distiller or owner thereof."

Question: Did the Court of Claims have jurisdiction of the suit?"

Decision: "It was never contemplated by the statute under which this claim is made that upon the action of the Commissioner determining the matter adversely to the distiller's claim, the courts should be called upon to review the Commissioner's discretionary decision. The Commissioner's functions with respect to the matter referred to under the statute are judicial in their nature, and his action concludes a claimant from taking to the courts for investigation the things designed to be finally settled by him. Whatever right, then, these plaintiffs have rests upon a statute which requires the action of a revenue officer to determine. Not only must the loss of the spirits be fixed and the amount thereof determined, but it must also be found that it was without the fault of the distiller or owner by the Commissioner of Internal Revenue. This excludes our jurisdiction."

The demurrer was sustained and the petition dismissed.

CORRY v. BALTIMORE

(U. S. Supreme Court, February 20, 1905)
(196 U. S. 466)

Record: Suit in Maryland state court by a citizen and resident of Pennsylvania to restrain a Maryland corporation from withholding and paying to Maryland a tax on his shares of stock therein. Demurrer sustained and bill dismissed. Affirmed by Maryland Court of Appeals. Writ of error from United States Supreme Court. Affirmed.

Facts: A corporation in Baltimore was formed under the laws of Maryland. Corry, a resident and citizen of Pennsylvania, acquired 150 shares of stock. These shares were assessed by Baltimore for 1899 and 1900 for state and municipal taxes. Conformably to the laws of Maryland, payment of said taxes was demanded of the corporation. To restrain compliance with this demand Corry commenced this suit against certain officers of the city and against the corporation, on the ground that the state laws were repugnant to the state and federal constitutions. A decree was entered sustaining demurrers and the bill was dismissed, which decree was affirmed by the Court of Appeals of Maryland. In the case of stock in Maryland corporations owned by nonresidents, the Maryland statutes declared the situs of such stock, for the purpose of taxation, to be at the principal office of the corporation in Maryland, and such shares were there assessed to the owners. The corporation was required to pay these taxes, without reference to the dividends, giving the corporation a lien upon the shares of stock, etc. The tax was on the stockholder personally because of his ownership of the stock.

Questions: (1) May a state tax nonresident owners of shares of stock in its corporations?

(2) Is notice to the corporation of the assessment of such stock sufficient notice to the owner?

Decision: (1) It was contended that as the situs of the stock within the state was the sole source of jurisdiction of the state to tax, the taxation must be confined to an assessment in rem against the stock, with the remedy for enforcement confined to the sale of the thing taxed, and hence without the right to compel the corporation to pay or to give it when it did pay, a personal action against the owner. The principle upheld by the ruling of the Supreme Court to which reference was made "is that the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and that a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation. Applying this principle, it follows that a regulation of that character prescribed by a

state, in creating a corporation is not an exercise of the taxing power of the state over persons and things not subject to its jurisdiction.'' The constitution of Maryland contained the reserved right to alter, amend or repeal charters.

(2) The court further held that the corporation was agent for its shareholders so that notice to it of the tax was notice to them. ''The condition attached by the Maryland law to the acquisition of stock in its domestic corporations, that the stockholders, for the purpose of notice of the assessment of the stock and proceedings for the correction of the valuation thereof, shall be represented by the corporation, is not in our opinion an arbitrary or unreasonable one, when it is borne in mind that the corporation, through its officers, is by the voluntary act of the stockholders constituted their agent and vested with the control and management of all the corporate property, that which gives value to the shares of stock and in respect to which taxes are but mere incidents in the conduct of the business of the corporation.'' The Maryland legislation in question does not contravene the due process clause of the Fourteenth Amendment. The judgment was affirmed.

COTHRAN & CONNALLY v. UNITED STATES

(U. S. Circuit Court of Appeals, Fourth Circuit, October 21, 1922)
(283 Fed. 973)

Record: Revenue Act of 1918. Plaintiffs sued defendant to recover taxes and penalty collected from them as brokers. Judgment for defendant (276 Fed. 48, ante 869) and plaintiffs bring error. Affirmed.

Facts: Plaintiffs conducted a tobacco warehouse. Producers sold their tobacco through the warehouse. Sales were conducted by the auctioneer of the proprietors of the warehouse. The owners of the tobacco usually attended the sale. If the highest bid was not satisfactory to the owner, he had the privilege of refusing it. If accepted, the warehousemen paid the owner the amount of the price offered less 3 per cent commission. The warehousemen afterwards invoiced the tobacco in their own name and at their own risk to the buyer, who paid the price to them. There was no direct contractual relation between the buyer and the owner of the tobacco.

Section 1001 of the Revenue Act of 1918 levied a tax on brokers and provided that "every person whose business it is to negotiate purchases or sales of * * * produce or merchandise, for others, shall be regarded as a broker."

Question: Were the plaintiffs subject to the tax as brokers?

Decision: Plaintiffs argued that as in the earlier statutes, from 1864 to 1914, dealers in tobacco were distinguished from brokers and a special and different tax was levied on them, there was "an intention to maintain a distinction between tobacco and other produce and merchandise in future legislation, however broad in terms, and that, too, although such future tax legislation repealed the special tax on dealers in tobacco."

"We think the true view is that by the acts of 1916 and 1919 the Congress expressed as clearly as possible the intention to abolish the distinction in tax legislation between dealings in tobacco and other produce and merchandise by omitting the tax on dealers in tobacco as such; and by the act of 1919 to put tobacco in the same class with other produce and merchandise by exacting a tax on brokers—that is, all persons who negotiate the sale of any produce or merchandise, including tobacco."

The judgment against plaintiffs, as brokers, was affirmed.

COTTON PRESS CO. v. COLLECTOR

(U. S. Circuit Court, D. Louisiana, November Term, 1873)
(Fed. Cas. 3,271)

Record: Section 120, Act of June 30, 1864, and Section 19, Act of July 13, 1866. Action to recover a tax alleged to have been illegally collected. Judgment for plaintiff.

Facts: The Act of 1864 levied a tax on dividends of a bank, trust company, savings institution and certain insurance companies. The limitation was, in the case of the failure of the Commissioner to render a decision on an appeal to him, that suit must be brought "within 12 months from the date of such appeal." The appeal and application for refund were executed, dated and deposited with the Collector on November 30, 1869, who forwarded the papers to the Commissioner, and he later received them and filed them in his office on a date subsequent to the 4th of December, 1869.

This action was commenced December 3, 1870. The matter was tried by the court on a stipulation of facts, the Collector urging that the tax was legal and that the claim for recovery was barred by limitations.

Question: When was the appeal taken, from which the 12 months of limitation commenced?

Decision: Plaintiff was held not to be such a company as was taxed under this act. "The appeal is to be made to the Commissioner of Internal Revenue, and not to the Collector. It is the Commissioner who is to examine the application and pass upon it. It would seem, therefore, that when the application is brought to his notice or filed in his office, and not till then, the appeal is taken." The court determined that the appeal was not taken until after December 4, 1869, and as the suit was begun within the year and was not barred, judgment was rendered for the plaintiff.

CUBA RAILROAD CO. v. EDWARDS

(U. S. District Court, S. D. New York, June 11, 1921)
(298 Fed. 664)

Record: Suit to recover income taxes paid. Defendant's demurrer overruled. (Pending in the Supreme Court.)

Facts: Plaintiff built one of its railroad lines under an agreement with the Cuban government that it would reduce by one-third its charges for government transportation, would transfer troops in case of war at reduced rates, and would reduce passenger fares over its lines, the government, after completion of the railroad, to pay the plaintiff at the rate of $5,000 per kilometer in six annual installments. Plaintiff built another line under contract with that government whereby it was to receive $6,000 per kilometer, payable as the work progressed, in six annual installments, was to transport mail free and certain fruits at half rates and to permit the government to maintain telegraph and telephone lines on its right of way.

The lines of railroad were completed and annual payments were made to the plaintiff by the Cuban government, on which an in-

come tax was claimed to be due for the years 1911 to 1916, inclusive. This tax was paid under protest, and amounted to $20,239.18. A further income tax of $13,685.14 was paid by the railroad, and afterwards returned by the United States Government, because of a miscalculation of the rate, and accepted by the railroad.

Questions: (1) Were the payments by the Cuban government to the company taxable as income?

(2) Was interest allowable on account of a refund which had been paid to and accepted by the taxpayer?

Decision: (1) "The question is whether the installments paid by the Cuban government were principal or income. Certainly they would not seem to be income in the ordinary sense. It is true that the first line of railroad had to be and was completed by the company before the subsidies were paid, and in the case of both lines there was something to be done on the part of the railroad in future by the terms of the contract. * * *

"The government's return in this case was to be secured by the development of the island through the construction and operation of the railroad, the privilege on the part of the government of placing telegraph and telephone wires on the right of way, and of securing the carriage of mails and passengers, produce, and troops upon prescribed terms. The fixing of rates is apparently a proper subject of governmental regulation. Would a subscription to stock be income because payable after the railroad was completed? I cannot see the merit of such a contention. The purpose seems clear to add to the funds of the railroad company, doubtless for the purpose of providing equipment or repaying obligations incurred in construction. Whatever the purpose of the subsidies, they in no way resemble earnings. They have but the remotest resemblance to a gain from either capital or labor."

(2) "No interest can be allowed on the sum of $13,685.14, repaid by the Commissioner after discovering his mistake in calculating the tax, and accepted by the company. Stewart v. Barnes, 153 U. S. 456" (ante 490).

CULLINAN v. WALKER, COLLECTOR

(U. S. Supreme Court, April 30, 1923)
(262 U. S. 134)

Record: Act of 1916. Plaintiff brought action for the recovery of additional tax collected. Judgment for defendant. Writ of error. Affirmed.

Facts: Cullinan owned over one-fourth of the stock of Farmers Petroleum Company, a Texas corporation having a capital of $100,000. That corporation was dissolved in 1915 and he became one of the trustees in dissolution. The next year, the trustees organized two Texas corporations, one a producing concern and the other a pipe line concern, transferring to each one-half of the assets formerly owned by the original corporation. From each they received $1,500,000 of bonds and the same amount of stock, being the total issues. They then organized a Delaware holding corporation and transferred to it the capital stock of the two Texas corporations, receiving $3,000,000 of its stock. All the securities they held as aforesaid were then distributed pro rata among the persons who had been stockholders of the original company. The stock and bonds were all worth par. The two new Texas corporations had, at the time of the distribution, no assets other than those received from the trustees. Cullinan received his proportionate share of all of the securities, over one-fourth. The aggregate value of the securities he received was $1,598,400. His investment in the original company was $26,640. The tax was assessed on the difference. Plaintiff insists his gain was simply an incident to the reorganization and that the securities received by him were, in legal effect, a stock dividend and that, under Eisner v. Macomber (252 U. S. 189, ante 196) he was not taxable thereon. The Government insisted that the securities were income within the rule laid down in United States v. Phellis (257 U. S. 156, ante 994) and Rockefeller v. United States (257 U. S. 176, ante 970).

Question: Did the gain arising from the distribution of the securities of the new corporations issued in consideration of the assets of the original corporation constitute taxable gain?

Decision: "The gain, which, when segregated, becomes legally income subject to tax, may be segregated by a dividend in liquida-

tion, as well as by an ordinary dividend.'' ''The corporation, whose stock the trustees distributed, was a holding company. In this respect it differed from Farmers Petroleum Company, which was a producing and pipe line company. It differed from the latter, also, because it was organized under the laws of another State. * * * When the trustees in liquidation distributed the securities in the three new corporations, Cullinan, in a legal sense, realized his gain; and became taxable on it as income for the year 1916.''

CULP BROS. PIANO CO. v. MOORE

(Supreme Court of Arkansas, February 4, 1924. Rehearing Denied February 25, 1924)

(258 S. W. 326)

Record: Action by Moore against the company to recover a balance on certain notes. Judgment for plaintiff. Defendant appealed. Affirmed.

Facts: Moore sued the company to recover a balance on certain notes which had been given him on the purchase by the company from him of stock of the company. Defendant admitted executing the notes but alleged a breach of the contract by Moore, and also set up that since the purchase of the stock, the corporation had been compelled to pay an additional income tax for a period prior to such purchase, and that Moore should be required to pay a proportionate part of this tax.

Question: Is a former stockholder liable for a proportionate amount of an additional income tax levied against a corporation for a period prior to his sale of the stock?

Decision: ''The federal income tax on the income of the corporation was primarily the debt of the corporation, and there is no legal obligation upon the stockholders, after they have sold their shares of stock in the corporation, to pay the income taxes that had accrued and had not been paid prior to the sale of such stock, and, in the absence of an express agreement on the part of the stockholder at the time of the sale of his stock to pay his proportionate share of such taxes, he would not be liable to the purchasers of his stock for such taxes. The taxes are not laid upon the stock, but on the corporate income.''

CUMMING et al. v. UNITED STATES

UNITED STATES v. CUMMING et al.

(U. S. Supreme Court, April 22, 1889)

(130 U. S. 452)

Record: Action was begun in the Court of Claims against the United States for damages for wrongful acts of the Collector. Judgment for plaintiffs reversed on appeal.

Facts: Cumming and Miller, surviving members of the late firm of J. M. Cumming & Co., formerly manufacturers, distillers, etc., recovered judgment against the United States in the Court of Claims for damages sustained by that firm in consequence of certain acts of a Collector of Internal Revenue. The suit was brought under authority of a special act of Congress enacted for the relief of said partners. This act permitted them to sue in the Court of Claims, "which court shall pass upon the law and facts as to the liability of the United States for the acts of its officer, Joshua F. Bailey, by reason of the seizure, detention and closing up of the commission house and bonded warehouse of said co-partners," etc., the United States to appear and defend and either party to have the right of appeal, "any statute of limitation to the contrary notwithstanding."

Question: Did this statute go further than to remove the bar of the statute of limitation, and did it authorize the rendering of a judgment against the United States contrary to the general principle against liability for unauthorized wrongs inflicted by its officers?

Decision: The court said that it was evident that Congress intended to remove the bar of limitation, the effect of the statute being to authorize the Court of Claims to render such judgment as, under the evidence, would be consistent with the law. "The only right waived by the Government was a defense based upon the statute of limitations. * * *

"According to this construction of the act, the plaintiffs were not entitled to judgment against the United States in any sum; however, if Collector Bailey and other revenue officers did nothing more than the law authorized them to do, neither they nor the Gov-

ernment would be liable in damages; while, if they acted illegally, they would be personally liable in damages; not the Government.''

DANE v. JACKSON

(U. S. Supreme Court, June 1, 1921)
(256 U. S. 589)

Record: Massachusetts Income Tax Act of 1916 and amendments; Massachusetts Act of 1919, chapter 314; and the 14th amendment to the U. S. Constitution. Petition for writ of mandamus to compel the treasurer not to distribute the state income tax among the various taxing subdivisions. Petition dismissed (237 Mass. 50, ante 167). Writ of error. Affirmed.

Facts: The act in question provided for the distribution of the proceeds of an income tax among the towns, cities and taxing districts of the state. The contention was that it violated the due process and equal proection clauses of the 14th amendment to the U. S. Constitution. By the 44th amendment to the Massachusetts constitution, the General Court was given power to impose a tax at different rates upon income derived from different classes of property, but at a rate uniform throughout the state on incomes derived from the same class of property, and to exempt property producing such income from other taxes. The validity of the taxing act was not assailed. The contention of unconstitutionality rested wholly upon the allegation that the portion of the income tax collected from the plaintiff in error and other inhabitants of his town returned to other subdivisions might upon their election be used for local purposes, such that no benefit would accrue to plaintiff in error and the other inhabitants of his town.

Question: Is the act requiring distribution of this tax unconstitutional?

Decision: ''Since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the dispositon or power of this court to revise the necessarily complicated taxing systems of

the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures * * *; and * * * where, as here, conflict with Federal power is not involved, a state tax law will be held to conflict with the 14th Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation,—'to spoliation under the guise of exerting the power of taxing.' "

The income tax involved is uniform in its application to income throughout the state. "It is collected by the state, and the capital value producing the tax is practically exempted from other taxation. The tax was authorized by the people of the state." The act was passed to correct flagrant inequalities of taxation from "colonization" of wealthy owners of intangible securities in towns and cities which have low rates of taxation, "brought about by the avoidance and evasion, legal and illegal, of the tax laws." Reference was made to the contention that the subdivisions receiving the proceeds of the tax might devote them to local purposes, and the court quoted from another decision that there was nothing in the record "to justify the assumption that the several municipalities design to devote to other than public use any portion of the income tax thus distributed to them."

The judgment of the Massachusetts Supreme Court was affirmed.

DANVILLE BUILDING ASSOCIATION v. PICKERING, COLLECTOR et al.

(U. S. District Court, S. D. Illinois, S. D., October 5, 1923)
(294 Fed. 117)

Record: Revenue Act of 1918. Action at law to recover stamp taxes paid under protest. Demurrer to the declaration sustained.

Facts: The plaintiff is a building and loan association, organized under the laws of Illinois, making loans to members or shareholders. When a loan is made the member is required to assign

a certificate of shares to the association as collateral security, to execute an instrument called a "Contract," and to convey by mortgage the real estate upon which the loan is used. The collector found the instrument described as a "Contract" to be, in fact, a bond, and subject to stamp tax as such.

Question: Was the "Contract" a bond within the description of Title XI, Schedule A, paragraph 1 of the Revenue Act of 1918?

Decision: The court found that the "Contract" disclosed the following obligations: (1) The first party acknowledged that he was indebted to the second party in the sum of $———. (2) The first party assigned as collateral security for the said loan his certificate evidencing his ownership of shares of stock in the association. (3) The first party agreed to pay to the second party the sum of $——— as monthly dues on his shares of stock, together with interest payable monthly. (4) The first party agreed to pay all taxes and assessments on the premises mentioned in the mortgage accompanying the bond. (5) In case of default of the first party, the second party had the right to declare the shares of stock forfeited and to bring foreclosure proceedings. (6) The instrument was required to be executed under seal.

The court found that the instrument came within the definition of a bond, which has been defined as "a sealed obligation to pay money." The fact that the instrument was labeled a "contract" did not take it outside the provisions of the statute. The court further held that the fact that the seal was unnecessary did not alter the situation any more than it would if the writing itself was unnecessary. Plaintiff claimed it was not a certificate of indebtedness because it was non-negotiable and non-assignable and that it had none of the attributes of an investment security. The Court said: "The statute and the regulations prescribed by authority thereof provide no such exceptions. * * * Judged by its face and form, which is the only way courts may pass upon the taxability of such a document, the instrument is clearly a bond of indebtedness * * *."

DAVIES et al. v. MILLER et al.
(U. S. Supreme Court, April 1, 1889)
(130 U. S. 284)

Record: Act of June 30, 1864, and Section 2931 R. S. Action in the U. S. Circuit Court, Southern District of New York, against the collector's executors to recover duties exacted on importations in 1873. Judgment for defendants. Writ of error. Reversed and remanded.

Facts: Plaintiffs contended the duties were excessive; that appeals to the Secretary of the Treasury were taken and this action brought in due time; that the protests were filed after the collector's decision on the rate and amount of duties but before the final ascertainment and liquidation of the duties had been stamped on the importations. The court directed verdict for the defendants on the ground that the protest was filed before the liquidation of the entry, and not within ten days thereafter, as required by law. The statutes provided that the collector's decision as to the rate and amount of duties should be final unless the owner, etc., "shall within ten days after the ascertainment and liquidation of the duties" give notice to the collector, etc.

Question: Must the protest be filed within the period of ten days after the final ascertainment and liquidation of the duties as stamped upon the entry, or at any time between the date of the collector's original decision and the expiration of the period named?

Decision: The court discussed certain prior statutes on this point, and the decision of Chief Justice Taney, thereunder that the protest might be made prospectively so as to cover subsequent similar importations, because "the protest is legally made when the duties are finally determined, and the amount assessed by the collector; and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due; and that the claimant means to assert his rights in a court of justice."

The court held the words of the statute to fix the limit beyond which the notice should not be given, and not to fix the

final ascertainment and liquidation of the duties as the first point of time at which the notice might be given. "In the case at bar, the result is that the notice on each entry, having been given after the collector's decision and before the expiration of ten days from the date of finally stamping upon the entry the ascertainment and liquidation of the duties, was seasonable."

DE BARY et al. v. SOUER, COLLECTOR

(U. S. Circuit Court of Appeals, Fifth Cir., April 24, 1900)
(101 Fed. 425)

Record: Revised Statutes, Section 3244. Suit against Souer, Collector, to recover tax paid under protest. Judgment for Government. Writ of error. Reversed and remanded. (A writ of error was taken from the subsequent decision below, but an affirmance followed. No new material question was raised.)

Facts: This tax was paid in New Orleans upon the collector's claim that plaintiff was selling liquor in Louisiana. Plaintiff's offices were in New York, where plaintiff accepted offers of customers, and paid tax. Plaintiff had liquor in warehouse in Louisiana which was shipped out upon direction of New York office.

Questions: (1) Was plaintiff selling liquor in Louisiana, and therefore bound to take a Louisiana license?

(2) Shall the statute be interpreted liberally in favor of the Government?

Decision: (1) The sales were made in New York and not in Louisiana. "If a constructive delivery of the liquors in question was made at New York by the vendors, the license taken out by the plaintiffs in error covers their right to sell without additional tax at New Orleans * * *. The facts * * * show clearly enough that there was a constructive delivery made at New York to the purchasers of such goods as were, at the time of the completed sale, in the warehouse at New Orleans."

(2) "We do not agree with the suggestion of counsel for the defendant in error that the statute imposing a license tax should be liberally construed in favor of the Government. We think the language embodied in the statute should be fairly and judicially

construed, as between both parties." The court referred to the inadequacy of the evidence, but stated that the trial court erred in directing a verdict for the defendant in error and that "We think the jury, if the case had been given to it, might fairly have concluded that 'the bargain and sale' of the goods sold was completed in, and constructive delivery was made at, New York."

DE WITT v. UNITED STATES

(U. S. District Court, D. Colorado, July 28, 1923)
(298 Fed. 182)

Record: Action at law. Demurrer to complaint sustained.

Facts: Plaintiff recovered a judgment, January 30, 1917, against Skinner, Collector, for $16,171.49, which included interest to the date of the judgment and costs in a suit for the recovery of a tax paid under protest. On December 30, 1918, the Court of Appeals affirmed the judgment, the mandate making no reference to interest on the judgment. After the issuance of a certificate of probable cause and on July 22, 1919, the U. S. Treasurer paid plaintiff the amount of the original judgment and costs, which was accepted under protest, interest being demanded on the amount of the original judgment to the date of the warrant. This was refused and the plaintiff brought action for that amount and interest thereon from July 22, 1919, until paid. Defendant demurred, challenging the court's jurisdiction of the subject-matter of the action as well as the sufficiency of the facts set forth in the complaint. Rule 30 of the Circuit Court of Appeals provided that, on affirmance of a judgment of an inferior court, interest should be calculated and levied "from the date of the judgment below until the same is paid."

Question: Might the District Court allow such interest without directions therefor in the mandate of the Court of Appeals?

Decision: It was contended by the District Attorney that the rule quoted above was only for the direction of the Appellate Court itself and not for the trial court and that the mandate of the Appellate Court must be followed explicitly. Reference was had to decisions in the Circuit Court of Appeals for the Sixth and Ninth Circuits, and the following quotation was given from

the latter: "Rule 30 is a rule for the guidance of this court only. It is not a rule of the circuit or district courts. The method by which the successful litigant in a case in this court may acquire the interest which is contemplated by the rule is only through the mandate of this court directing its allowance in the court below."

"In the case of In re Washington and Georgetown R. R. Co., 140 U. S. 91, * * * the Supreme Court has laid down the general proposition without any discussion of a rule of the court, that where a mandate of that court does not provide for interest the lower court had no power to allow it.

"I therefore come to the conclusion that this is an insuperable obstacle to the plaintiff in the prosecution of his claim. The relief sought by the plaintiff might have been secured at the time by application for a rehearing in the Circuit Court of Appeals with the purpose of securing a modification of the mandate to include interest."

DISSTON et al. v. McCLAIN, COLLECTOR

(U. S. Circuit Court of Appeals, Third Cir., July 9, 1906)
(147 Fed. 114)

Record: Act of June 13, 1898. Suit to recover inheritance taxes paid. Demurrer. Sustained. Judgment for defendant (143 Fed. 191). Writ of error. Reversed. (Certiorari was denied, 207 U. S. 587.)

Facts: Testator, Horace C. Disston, died June 13, 1900. His will was probated June 19, 1900, and appointed plaintiffs executors. The taxes were paid McClain, June 21, 1901. The will gave certain property to trustees, part of the income to be paid in quarterly installmemnts to Rachael Asch during her life. The taxing act was repealed, effective July 1, 1902, and plaintiffs contended that all taxes in excess of the proper amount levied on receipts by the beneficiary prior to that time should be refunded.

Question: Was the tax properly assessed?

Decision: The court quoted Sections 29 and 30 and said that the trial judge rested his conclusion upon what he supposed to be the authority of the decision in Vanderbilt v. Eidman, 196 U. S. 480 (post). The tax was imposed upon legacies and

distributive shares. This legacy "is not a sum certain given once for all to the legatee, but a yearly sum of $15,000, to be paid to Rachael Asch in stated quarterly payments during the term of her natural life, out of the income of the whole estate, real and personal, of the testator, devised and bequeathed to trustees for the purposes of his will. The natural meaning of such a provision, and of the language used, would seem clearly to be a series of legacies or bequests vesting in possession or enjoyment at stated intervals, but each, contingent, before vesting, on the legatees being alive when it became due, the tax on which is not to be paid, as we shall see presently from the authoritative opinion of the Supreme Court in the Eidman case, until and as it takes effect in possession or enjoyment.

"To sustain the action of the Collector we have to ignore the fact that there is no gift to Rachael Asch of a definite sum as an entirety, other than the quarterly payments which the trustees of his residuary estate, real and personal, are directed to make out of the income thereof, year by year, during the term of her life. Nor is any sum given to the trustees or set apart by the will, the income of which, whatever it may be, is to be for the use of Rachael Asch. To create the corpus of a legacy, the income of which will supply these definite quarterly payments, would impose upon the trustees the necessity of setting apart such an amount of money as would, in their judgment, produce the income, thus creating a principal sum or corpus which the testator has not seen fit to create in the shape of a legacy, and to so create it by the mere exercise of a judgment which may prove mistaken in its results. The sum thus arbitrarily estimated, the Collector assumes the right of appraising as the legacy of a life estate in personal property, the present value of which, for the purpose of taxation, is to be ascertained by rules and methods not designated in the tax law, nor, as we think, authorized or contemplated thereby."

"The mode adopted by the Collector in this case is entirely unauthorized by the statute, for he did not estimate by life tables the value of a life estate in a designated and ascertained fund, but by an exercise of his arbitrary judgment, proceeded to ascer-

tain or create the fund that would produce the income, though it had not been ascertained or designated by the testator, and then proceeded to value it by the use of the life tables.''

The collector relied upon a provision in said section 30 that the schedule should be made ''in such form or manner as may be prescribed by the Commissioner.'' The court said: ''Executive officers may be authorized to prepare blanks and forms, or prescribe in certain respects the manner of executing the legislative will but they may not receive a delegation of the legislative power, even if such delegation were intended to be made. We think, therefore, there was no tax imposed by the Act of 1898 on the interest of Rachael Asch, other than the specific payments of the annuity bequeathed to her as the same should from time to time fall due.''

DISTILLED SPIRITS

(U. S. Supreme Court, December, 1870)
(11 Wall. 356)

Record: Acts of June 30, 1864, and July 13, 1866. Action by the Government for forfeiture of certain distilled goods. Judgment for Government. Affirmed.

Facts: Act of June 30, 1864, as amended by Act of July 13, 1866, provides that ''all goods, wares, etc., on which taxes are imposed, which shall be found in the possession * * * of any person or persons in fraud of the internal revenue laws * * * shall be forfeited.'' The Act of 1866 provided: ''All distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law not having been paid, shall be forfeited.''

Question: Does the Act of 1866 supersede the Act of 1864, or are they to be construed together?

Decision: The two Acts are consistent. ''An examination of the Act of 1864 will show that the first fifty-two sections are of a general character, intended to apply to all taxes imposed by the Act, and that the forty-eighth section is especially of that character, and applies to distilled spirits as well as to all other articles. By the Act of 1866, this section was amended in a manner not

material to the question at issue * * *. It still stood as it did before * * *. The addition in the Act of 1866 of several new sections relating to the removal of distilled spirits from a bonded warehouse, and imposing penalties and forfeitures for giving fraudulent bonds for that purpose * * * does not deprive the forty-eighth section of the Act of 1864 of its general application. There is nothing incongruous or repugnant between it and the new sections. Both can stand * * *. It is a very common thing for cumulative remedies to be thus provided. * * * Statutes in pari materia, like the Acts of 1864 and 1866, are to be construed together, and repeals by implication are not favored if the Acts can reasonably stand together."

DODGE v. WOOLSEY

(U. S. Supreme Court, April 8, 1856)
(18 How. 331)

Record: Section 10, Article 1, Constitution of the United States. Suit in the United States Circuit Court to enjoin the collection of a state tax. Decree for complainant. Appeal. Affirmed.

Facts: Woolsey brought suit to enjoin the collection of an Ohio tax assessed against the Commercial Branch Bank of Cleveland, making defendants, Dodge (who was the tax collector), the directors of the bank and the bank itself. He averred that he was a citizen of Connecticut and the owner of thirty shares in the bank; that Dodge and the other defendants were all citizens of Ohio, the bank being a corporation of Ohio; that the bank, as required by its charter, had set off 6 per cent of its profits for the state, the statute declaring that such sum should be in lieu of all taxes to which it would otherwise be subject; that his purchase of the stock was in reliance upon this provision as to taxation by the state; that a new constitution was subsequently adopted by the state, declaring that the property of corporations should be subject to taxation as the property of individuals; that the General Assembly of Ohio passed an act April 13, 1852, requiring certain returns from banks and the taxation of its property for the same purposes and to the same extent as other personal property; that such a return had been made for

1852 by the bank in question; that the property so returned had been assessed for state taxation in excess of the amount required by the charter; that Dodge collected said tax by distraint; that another tax for 1853 had been levied against the bank, exceeding the amount for which it was liable under its charter; and that the collection of said tax should be enjoined as in violation of Section 10 of the first Article of the Constitution of the United States which declared that no state should pass any law impairing the obligation of a contract. He further stated that if said tax were permitted to be collected, it would virtually destroy the contract between the state and the bank, thereby lessening the value of his stock and diminishing his dividends; that the tax is so onerous it would compel a suspension of its business; and that as a stockholder he had requested the directors of the bank to take measures against the collection of this tax but they had refused to do so. Dodge answered admitting the allegations, except that the tax was unconstitutional and except that he denied that Woolsey had made the application to the directors which was alleged, and stating that even if the tax had been collected by distraint, the bank would have an adequate remedy at law by suing for its recovery, because he was financially responsible. It was agreed, however, that Woolsey had requested the bank to bring such a suit, resisting the tax, and that the directors had passed a resolution stating that they believed the tax to be invalid but that in consideration of the many obstacles in the way they could not consent to take the action requested. The circuit court rendered a decree for complainant, enjoining the treasurer from collecting the tax, etc. Dodge appealed.

Question: Was the state tax unconstitutional as impairing the obligation of a contract, and might its collection be enjoined at the suit of a stockholder?

Decision: Courts of equity "have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of

stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, if the acts intended to be done create what is in law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. * * * Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty than of an error of judgment'' and ''it is our opinion that they were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. * * * The equity jurisdiction of courts of the United States is independent of the local law of any state, and is the same in nature and extent as the equity jurisdiction of England, from which it is derived, and * * * it is no objection to this jurisdiction that there is a remedy under the local law.''

''The law of 1845 was an agreement with the bank, quasi ex contractu—and also an agreement separately with the shareholders, quasi ex contractu—that neither the banks, as such, nor the shareholders as such, should be liable to any other tax larger than'' the 6 per cent on the profits heretofore mentioned. This provision as to the 6 per cent ''is a legislative contract equally operative upon the state and upon the bank and the stockholders of the bank, until the expiration of its charter.''

DOUGLAS v. EDWARDS, COLLECTOR

(U. S. Circuit Court of Appeals, 2nd Cir., April 7, 1924)
(298 Fed. 229)

Record: Revenue Act of 1917. Action to recover taxes paid under protest. Verdict directed for defendant and judgment entered thereon dismissing the complaint (287 Fed. 919). Writ of error. Reversed with directions. (Certiorari was granted, October 20, 1924.)

Facts: The facts were stipulated and each side moved for a directed verdict. Action was brought to recover $173,579.72

paid under protest as additional income tax for 1917, levied on so-called depletion distributions made in September and December of that year by Phelps Dodge Corporation, a mining company, and received in his lifetime by James Douglas, plaintiffs' deceased. A claim for refund had been denied. Plaintiffs contended that the dividends were not taxable as income, or if so then not at the 1917 rate. Defendant denied this. Phelps, Dodge & Co., Inc., was organized with an authorized capital of $50,000,000, the shares having a par value of $100 each, and $45,000,000 of stock was issued for $90,000,000 of assets, $66,000,000 representing copper and coal mines, and $24,000,000 representing other assets. The corporation thus had a capital stock of $45,000,000 and a paid-in surplus of $45,000,000. On March 1, 1913, Douglas held 41,025 shares. On July 2, 1913, he purchased 25 additional shares. In the re-organization of the company, he transferred all his shares and received an equal number of shares in the new Phelps Dodge Corporation, which shares he held until his death, June 25, 1918. Each year from 1913 to 1917, a certain amount was credited on the books of the company to a depletion reserve. In 1919, the Commissioner made a provisional valuation of the mining properties for depletion, as of March 1, 1913. The mines were valued at $132,285,000; the plant, investments and other assets at $20,990,606.69.

The company's returns for 1917 and 1918 were audited and closed by the Commissioner and the tax paid. Upon the basis of the revised figures, the aggregate depletion reserve for the period from 1913 to 1917 was increased from $14,416,783.88 to $25,837,427.91. In 1913, 1914 and 1915 over $7,000,000 was paid out in addition to the profits earned in those years, after making the proper allowance for depletion. In 1916, it had an excess of its profits over dividends paid and the depletion allowance of $3,125,621.67. In 1917, it earned net profits of $16,742,487.06 and paid dividends of $10,800,000. In September, 1917, the board of directors resolved that it should distribute from the depletion account $3 a share, "the total amount so paid to be deducted from said depletion account." In the following December, a similar resolution was adopted, distributing $5 a share.

The total of these distributions aggregated $3,600,000 and the amounts received by Douglas therefrom aggregated $328,400.

In his 1917 return, Douglas included all dividends except the two so-called depletion dividends, inserting a note, however, regarding these distributions. The Commissioner included them and the tax thereon was paid by the executors of Douglas and this forms the subject-matter of the controversy. Deducting the $10,800,000 dividends and the $3,600,000 so-called depletion dividends from the $16,742,487.06 earnings of 1917, there still remained a balance of 1917 earnings of $2,342,487.06.

Questions: (1) Were the so-called depletion dividends distributions of capital and hence not taxable?

(2) What is the meaning of the word "deemed" in the statute?

(3) What is the meaning of the terms "surplus" and "undivided profits" in the statute?

(4) Should the tax have been assessed at the 1917 rate or at the rate prevailing in some previous year?

Decision: (1) The court said there was no question as to good faith, but the rights of parties could neither be established nor impaired by the bookkeeping methods employed or the names given to the various items.

"The first contention is that the two so-called depletion distributions were of capital to the stockholders, and hence not taxable under the Sixteenth Amendment of the Constitution of the United States. On March 1, 1913, Douglas owned 41,025 shares of Phelps Co. On July 2, 1913, he acquired 25 more shares. These 41,050 shares he owned in 1917, when he received his proportion upon the distribution of the so-called depletion dividends." The court said that the determination of this question rested upon the understanding of two supreme court cases, namely: Lynch v. Turrish, 247 U. S. 221 (ante 322) and Lynch v. Hornby, 247 U. S. 339 (ante 321), and that it was unable to distinguish this case from the Hornby case, in which it was said that though the dividends were "extraordinary in amount and 'might appear upon analysis, to be a mere realization in posses-

sion of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing,' yet they were taxable.''

''Under the act of October 3, 1913, all dividends distributed after March 1, 1913, were taxable, whether the profits out of which such dividends were declared were accumulated before or after that date. Although the World War had begun and economic conditions had been disturbed, the Revenue Act of 1916 permitted the declarations of dividends out of surplus accumulated prior to March 1, 1913, tax free, even though profits earned subsequent to March 1, 1913, remained undistributed. This history throws some light on the controversy, because, under section 31 (b) of the 1917 Act, while profits accumulated prior to March 1, 1913, could still be distributed tax free, that tax-free distribution could be availed of only after distribution of earnings and profits accrued since March 1, 1913, had been made.''

(2) If it had been intended that the word ''deemed'' should mean ''a rebuttable and not a conclusive presumption, the word 'presumed' could readily have been used.'' The word used, ''deemed,'' is the equivalent of ''considered'' or ''adjudged.''

''We think it was the purpose of the statute that any distribution made to shareholders should be conclusively presumed to have been made from the most recently accumulated undivided profits or surplus, and that it was intended that the corporation should not be permitted to determine to what year or period or to what fund it would allocate such distribution.''

(3) The court quoted the definition of the word ''surplus'' from another decision as ''indicating an amount left over after setting aside sufficient of the assets * * * to meet * * * liabilities.''

''The expression 'undivided profits' is for all practical purposes of this statute synonymous with 'surplus' and certainly with 'accumulated surplus.' It means such profits as exist and have or have not been ascertained, but, in any event, have not been distributed or otherwise used and is distinguishable from current earnings or profits. * * *

"Accumulated surplus or undivided profits are ordinarily ascertained at the end of a given calendar or fiscal year. What are the true accumulated undivided profits, or what is the true accumulated surplus, is always a question of fact, and under a revenue statute, that question of fact is usually determined by the appropriate bureaus of the Treasury Department, subject to such review as may be provided by statute. A person or a corporation really does not know what are the profits of his or its business until the conclusion of some fixed period, whether it be a calendar or fiscal year. If a corporation on February 1st of any year were to distribute in dividends profits made in the January immediately preceding, it might find that all these profits would, for one reason or another, be wiped out in March of the same year. * * * In taxing statutes, however, as in most other matters regulated by law, we do not deal in abstractions, and an income tax statute usually provides for fixed periods as the measure of calculation and obligation, and this is because business, large and small, is done that way and no man in active business can tell where he stands financially for a given time, whether it be a calendar year or fiscal year, or some other definite period, until he shall have arrived at the end of that period * * *."

(4) "Defendant in error contends that the statute means that, if a distribution was made on or after August 6, 1917, during the year 1917, and if the amount thus distributed was equal to or exceeded the current earnings for the year 1917, then the taxpayer stockholder was taxable at the 1917 rate. Plaintiffs in error contend, on the contrary, that the statute did not refer to current earnings, but to undivided profits or surplus accumulated in some year prior to 1917, and in the year wherein such undivided profits or surplus had most recently been accumulated.

"In view of our conclusion that the so-called depletion dividends were taxable, there was on hand on December 31, 1916, a sum amply sufficient to enable Phelps Co. to pay these dividends out of the accumulated surplus or undivided profits as of December 31, 1916, and these dividends distributed to and received by Douglas should have been taxed at the rate prevailing in 1916."

DREW et al. v. DUPLEX PETROLEUM CO.

(Oklahoma Supreme Court, April 15, 1924)
(225 Pac. 892)

Record: Act of October 22, 1914, regarding internal revenue stamps. Suit on promissory note. Judgment for plaintiff. Appeal. Affirmed.

Facts: The company sued on a promissory note originally for $17,000, on which a credit had been entered of $5,000. Defendants filed unverified general denials. They objected to the introduction of the note because it did not bear an internal revenue stamp. The court gave plaintiff leave to attach and cancel the stamp and the note was introduced in evidence. Plaintiff was given judgment. Defendants appealed.

Question: Was the note admissible in evidence?

Decision: The court said it was clear Congress did not intend to make promissory notes or other instruments of that character inadmissible in evidence by reason of not bearing the required revenue stamps. Cole v. Ralph, 252 U. S. 286 (ante 148), was cited as holding that this Act did not contain the words of former Acts, making the instrument invalid and inadmissible as evidence if not stamped. United States v. Masters, 264 Fed. 250 (ante 548), was said to apparently support the defendant's contention so far as proceedings in the federal courts were concerned, but the decision therein was not followed. "We conclude that the absence of the internal revenue stamps * * * never invalidated the note in question nor rendered it inadmissible in evidence."

DUGAN et al. v. MILES, COLLECTOR

(U. S. Circuit Court of Appeals, Fourth Cir., July 3, 1923)
(292 Fed. 131)

Record: Federal estate tax. Action to recover estate taxes. From the judgment of District Court for Maryland (276 Fed. 401; ante 880) both parties took writs of error. Reversed.

Facts: Testator in his will gave his widow power to dispose of $250,000 of his estate by her last will and testament and pro-

vided "while I do not enjoin it upon her, still, I would be gratified if she would give the said sum or so much thereof as she thinks best, for the same charitable objects and purposes hereinafter mentioned, in whatever proportions, according to her own judgment, she may determine." The income derived from the special fund of $250,000 was paid during the life of the widow to certain charities mentioned in the will.

Question: What part, if any, of the particular $250,000 disposed of in the will was exempt from taxation as a bequest to charity?

Decision: "The widow has full power to dispose of $250,000 of the estate by will in any manner she chooses. * * * She takes under the will no beneficial interest in the $250,000, except as it is a part of the general estate from which she is entitled to receive her annuity. If she fails to dispose of it by will it goes under the residuary clause to the charities named. The charities take no vested interest in the corpus of the $250,000; but they do take a vested ownership of the interest or income derived therefrom during the life of the widow, and are entitled to receive it subject only to the payment of annuities from the whole estate. Since the government has received without question from the whole estate the tax on so much of the value of the estate as is represented by the annuities, it cannot have the tax on the income derived from the special fund of $250,000 as a fund devoted to the payment of annuities and not to charity. The income of the $250,000 for the life of the widow, must be considered as a part of the bequest to the charities mentioned, exempt from the tax; the corpus is not bequeathed to charity and therefore is not exempt. The taxable value of the $250,000 at the death of the testator was decreased therefore to the extent of interest therefrom bequeathed to charity for the life of the widow." The court then decided that the value of $250,000 during the life expectancy of the widow, which went to charities, amounted to $73,203.50 and should be deducted from the total fund of $250,000 in arriving at the taxable value of the $250,000. Plaintiffs were, therefore, entitled to recover $4,392.15 with interest from date of payment, as excess estate taxes paid.

DU PUY v. CRUCIBLE STEEL CO. OF AMERICA

(U. S. District Court, W. D. Pennsylvania, March 13, 1923)
(288 Fed. 583)

Record: Action at law by president of corporation to recover from it his expenses in defending a prosecution for conspiracy to defraud, in making the corporation's tax return. Judgment for defendant on the pleadings.

Facts: Plaintiff alleged that while president of the corporation, certain returns of the latter were made, under his supervision; that he and the treasurer of the corporation were indicted for conspiracy to defraud; that he defended and was found not guilty; that he expended in such defense over $162,000; that all of the expenditures were necessary and proper; that defendant did not assist plaintiff but on the contrary was hostile; and that such expenses were incurred solely as a result of the acts done by him as an officer and agent of the corporation and in its behalf and for the best interests thereof. The indictments were drawn under Section 37 of the Criminal Code and charged conspiracy to defraud and that in pursuance of said conspiracy defendants committed certain overt acts, including the entry in the corporation's books of false "estimates or inventories of the personal property," several millions dollars below the true value; the entry of a false charge of $1,000,000 as additional depreciation; the false and fraudulent deduction of over $2,000,000 from the corporation's gross receipts; and the making of false returns for the corporation.

Question: Was the corporation liable to reimburse its president for the expenses incurred by him in defending this criminal action?

Decision: The court said that an acquittal on the indictment meant a finding either that the conspiracy was not formed, or, if formed, that the acts charged were not done in the execution of the conspiracy, and quoted from Selz v. Guthman, 62 Ill. App. 634; " 'A rule which pervades the whole law of principal and agent is that the principal is bound to indemnify the agent against the consequences of all acts done by him in due execution of the authority conferred upon him.' * * *

"The law required, and it became the duty of, the corporation's officers to file proper tax returns. There was nothing in the execution of that agency which could subject the agent to a criminal prosecution for conspiracy, in the ordinary course of human affairs. It goes for the saying that it could not be contemplated by the parties, in the execution of the agency, that the United States would prosecute a party criminally for doing that which the law required him to do. It follows that the criminal prosecution which resulted, could not have been, and was not, a direct and natural consequence of the making of the tax returns. In no sense did it flow directly and immediately from the execution of the agency; that is, from the making of the tax returns. That was a proper and legal thing to do. On the other hand, the prosecution flowed from the manner in which the return was made; the government charging, as set forth in the indictment, that the defendant was guilty, with another, of conspiracy to defraud the government in making false and fraudulent tax returns. In doing a perfectly legal thing, the agent may do it in such careless or criminal manner as to subject himself to a charge of criminality, and for the expenses of defending himself against such charge there can be no recovery in law. Nowhere in the statement of claim does it appear that the returns so made were true and correct returns, or, if incorrect, that this was the result of honest mistake. This is a very significant omission. On the whole, I am persuaded, under the authorities and on principle, that the plaintiff has wholly failed to state a cause of action, and that the defendant is entitled to judgment on the pleadings."

EARLE C. ANTHONY (INC.) v. UNITED STATES

(U. S. Court of Claims, May 1, 1922)

(57 Ct. Cls. 259)

Record: Sections 600, 602 and 1005, Act of October 3, 1917. Suit for the recovery of a tax paid. Judgment for plaintiff.

Facts: The corporation, a wholesale and retail dealer in automobiles, sold and delivered to purchasers certain automobiles under a form of agreement, purporting to be a lease. Payments thereon aggregating about one-half of the sales price were

not completed until after the becoming effective of the Act. The corporation did not include the automobiles as "held and intended for sale" under said section 602, in computing its tax liability. The collector demanded an additional assessment of over $1,000 which had been made by the Commissioner. After a claim for abatement had been rejected, the tax was paid under protest, with a penalty of 5% and interest. This was turned over to the United States by the collector. A claim for refund was rejected, and plaintiff brought suit for the recovery of the tax paid.

Question: Were the automobiles "held and intended for sale" by the corporation?

Decision: The tax under said sections 600 and 602 was known as a "sales tax; that is, a tax on the selling price of the article taxed." An article "sold and delivered under a so-called lease, even where the vendor retains the title, is a sold article," and not an article " 'held and intended for sale,' and consequently the vendor is not liable for the tax imposed by section 602."

"The character and purpose of the so-called lease * * * are not to be judged by the name applied to it. It was clearly in the nature of a conditional sale, but a sale nevertheless, and the instrument was intended as a mere security for deferred payments. Nearly half of the purchase price had been paid by the purchaser upon the delivery of the machine. His notes had been given for the balance and doubtless were promptly discounted at some bank by the vendor with the so-called lease attached as security, thus enabling the vendor to at once get the entire purchase price. So long as the vendee complied with the terms of the sale the vendor could not interfere with his possession and use of the machine, and for all practical purposes it was the vendee's machine. * * * The very purpose of the parties in making this arrangement was clearly to accomplish a sale and purchase under which there was a delivery which is inconsistent with the view that the machine was held and intended for sale by the vendor. He could only sell it upon default by the vendee."

Judgment was entered for the plaintiff.

EDWARDS v. KEITH, COLLECTOR

(U. S. Circuit Court of Appeals, Second Cir., January 31, 1916)
(231 Fed. 110)

Record: Revenue Act of October 3, 1913. Action to recover income taxes paid under protest. Judgment of the District Court for the Eastern District of New York, sustaining a demurrer to the complaint (224 Fed. 585). Affirmed. (Certiorari denied, 243 U. S. 638.)

Facts: Plaintiff was a life insurance agent and under his contract with an insurance company he received commissions upon renewal premiums as they were actually paid for a certain number of years covering policies which were originally issued prior to March 1, 1913.

Question: Were such renewal premiums paid after March 1, 1913, a part of the net income of the taxpayer "arising or accruing from all sources," between March 1, 1913, and December 31, 1913?

Decision: The court decided that the question was determined by the provision in the contract that "commissions shall accrue only as the premiums are paid in cash." The fact that the work for which the compensation was paid was done in prior years is unimportant. The statute does not provide that the "personal services," compensation for which is to be considered income, must be rendered in the same year in which the compensation is received. "The statute and the statute alone determines what is income to be taxed. It taxes only income 'derived' from many different specified sources; one does not 'derive income' by rendering services and charging for them." Under the Act of October 3, 1913, the court decided that a taxpayer was taxable in the year in which income was received on income accrued since March 1, 1913.

EDWARDS, COLLECTOR, v. SLOCUM

(U. S. Supreme Court, October, 1923)
(264 U. S. 61)

Record: Revenue Act of 1918. Suit to recover additional Estate Tax paid. Judgment for plaintiff (ante 977). The case

was taken by writ of error to Circuit Court of Appeals (287 Fed. 651) and by certiorari to the Supreme Court. Affirmed in both.

Facts: Mrs. Sage left an estate of over $49,000,000. She bequeathed over $1,000,000 to specified charities; over $8,000,000 to other purposes and the residue to certain charitable and educational institutions. It was admitted that over $5,000,000 was to be deducted for debts, expenses and the specific charitable gifts. These, with the individual gifts, would leave a residue of over $35,000,000 which the executors contended was exempt by the statute. The government argued that a residue is only what is left after the payment of paramount claims, and that the taxable estate should include the amount of the tax taken from what would otherwise be the residuary estate.

Question: Should the taxable net estate include the amount of the tax taken from what would otherwise be the residuary estate?

Decision: "The tax was levied * * * upon 'the transfer of the net estate of every decedent dying after the passage of this act' * * *." The court said this was not a tax upon the residue but a tax on the transfer of the net estate, as commented upon in Knowlton v. Moore, 178 U. S. 41 (ante 289). "It comes into existence before and is independent of the receipt of the property by the legatees. * * * It thus manifestly assumes that the net estate will be ascertained before the tax is paid. * * * The theory (of the government) departs from the long-established practice of the law not to regard the existence of a tax in the levying of a tax, and the position of the government is contrary to the expressed intention of the statute to encourage charitable bequests." The decisions of the courts below were affirmed.

EIDMAN, COLLECTOR, v. TILGHMAN et al.

(U. S. Circuit Court of Appeals, 2d Cir., February 24, 1905)
(136 Fed. 141)

Record: Act of June 13, 1898, as amended by the Act of March 2, 1901. Suit for the refund of a legacy tax paid. Demurrer. Judgment for plaintiffs. Writ of error. Affirmed. (This

decision was affirmed without opinion, on certiorari, 203 U. S. 580).

Facts: The defendants in error were executors of the will of Brittan, who died October 13, 1901. Section 29 of the act of 1898 declares that executors having in charge or trust legacies of personal property thereafter passing by will to any person should be subject to a tax at rates varying according to relationship. Section 30 declares that the tax shall be due and payable in one year after the death of the testator and contains provisions as to its collection. The act of June 27, 1902, repealed said section 29 and provided that all taxes imposed thereby "prior to the taking effect of this act" should be subject to the provisions of said section 30.

Question: Were the legacies in this estate taxable?

Decision: The court said that the repeal of a statute did not affect any right which had previously accrued under it if the remedy were preserved by the repealing act. "The phraseology of the repealing act is happily chosen to suggest doubt as to its meaning. The tax is 'imposed' by section 29 only in the sense that it is created or prescribed. * * * When in the words of the repealing act, all taxes or duties 'imposed' by section 29 'prior to the taking effect of this act' are to remain unaffected by the repeal, the meaning of the word 'imposed' is to be ascertained from the provisions of section 30." Congress may have intended that any legacy passing before the repeal should be liable to the tax. "But congress has not said this, and a tax is never to be exacted from a citizen by a doubtful interpretation of a taxing act. Ordinarily a tax cannot be regarded as imposed until it becomes a lien upon the property which is to be subjected to its payment." The court was of the opinion that the lien commenced when it became the duty of the executor to pay the tax "and consequently when the tax is imposed," citing the case of Mason v. Sargent, 104 U. S. 689 (post) as controlling on this point. Reference was also made to Clapp v. Mason, 94 U. S. 594 (ante), and the court said that these decisions were decisive in the present case. By the amendment of 1901 the tax "became payable one year after the death of the testator. As one year had not elapsed since the death of the testator when the repealing act

took effect, the obligation of the executor to make payment or render a list had not occurred, and no lien could attach.''

EMMICH v. UNITED STATES

(U. S. Circuit Court of Appeals, 6th Cir., April 15, 1924)
(298 Fed. 5)

Record: Sections 223, 253 and 262, Revenue Act of 1921, and Article 3, Regulations 62. Criminal prosecution for making a false income tax return. Conviction. Writ of error. Affirmed.

Facts: Emmich was charged with attempting to evade the tax for 1921 by understating his income in his return, and with perjury by making a false oath to such return. At the trial it developed he had made no return for 1920; that he returned $3,640 as his income for 1921; that income tax agents, after an investigation asked him why he had made no return for 1920 and to explain the return for 1921 in view of other information that he had large bank accounts. He denied having these accounts until confronted with the proofs. He finally admitted his income came from gambling. After his arrest and in compromise of his civil liability, he paid tax for 1920 upon an income of $5,500 and a tax for 1921 upon an income of $12,000. His offer of compromise of his criminal liability was rejected. He was found not guilty of perjury and convicted on the other charge.

The indictment was attacked as not charging that he was one of the persons required to file a return or pay a tax, and it was claimed the trial court erred in admitting evidence of his failure to file a return for 1920 and as to his occupation, income and expenditures during that year, and that his return for that year made out in 1922 was improperly admitted. Another error was assigned because of the admission of the amended return for 1921 on the ground that this return was made in compromise of the government claim. Error was also claimed because the original return for 1921 was introduced in evidence although there was insufficient evidence of its execution.

Questions: (1) Was the indictment sufficient in charging that defendant was a person required to file a return?

(2) Was it sufficient in charging him with being a person required to pay an income tax?

(3) Was evidence of failure to file a return for 1920 admissible to prove an indictment for "knowingly, willfully and feloniously" attempting to defeat the tax for 1921?

(4) Was the amended return, although claimed to have been made as part of an offer of compromise, properly admitted in evidence?

(5) Is an income tax return deprived of its evidentiary value because it is not under oath?

Decision: (1) "The statute recognizes three classes of persons: individuals, partnerships and corporations." The indictment did not describe him as an individual. The omission was held not to invalidate the indictment. "It is apparent from its language that he was complained against as an individual. The indictment refers to 'his income,' that 'he was the recipient of a net income,' and to 'his return,' and to 'his arrest.' "

(2) The regulations provide that tax is assessable against citizens of the United States except those entitled to the benefits of Section 262, wherever resident, and that nonresident aliens are liable to tax on their incomes from sources within the United States. The indictment gave his city, county and state and the District Court under the jurisdiction of which he was, and it stated that he made a return to the collector at Cincinnati, Ohio, and that he said in that return that he was the recipient of a net income of $3,640 for that year, and he was charged with failure to file an amended and true return. "It would seem to be clear that the defendant was charged with being the recipient of an income, a resident, and a person subject to the tax. It is a well-settled rule of law, moreover, applicable to such statutes as this, where there are excepted classes, that it is enough to charge facts sufficient to show that the accused is not within the exception."

(3) In a trial for one offense, evidence of other and distinct offenses is inadmissible, except that "if intent or motive be one of the elements of the crime charged, evidence of other like conduct by the defendant at or near the time charged is admis-

sible.'' * * * ''It is not controverted that motive or intent is one of the essential elements of the offense charged in this case; but it is urged that the evidence referred to falls within the rule, and not within the exception, in that the offense of failing to make a return is not a like offense to that of making a false return. * * * The real character of the offense lies, not in the failure to file a return, or in the filing of a false return, but rather in the attempt to defraud the government by evading the tax. * * * The court clearly limited the purpose for which the evidence might be considered, and we fail to find error in its admission for the reason assigned.'' His return for 1920, filed in 1922, was held admissible as evidence of his knowledge in the former year that he had a taxable income.

(4) ''Defendant filed an amended return under oath, showing taxable income in that amount. It is difficult to reconcile this return with any other thought than that it was in corroboration of defendant's admission of substantial liability to the government, rather than intended as an offer of compromise of a disputed claim. We find no error in the admission of the exhibit in evidence.''

(5) ''The original 1921 return of the defendant, whether sworn to or not, was filed by him as his return, and intended to be received as such by the collector, and if made falsely, and with knowledge of its falseness, was intended to deceive the collector, and to deceive and defraud the government. We believe it was properly admitted in evidence, and that the court was not in error in charging the jury that the oath was not the vital question in determining the guilt or innocence of the defendant.''

EMPIRE FUEL COMPANY v. HAYS, COLLECTOR

(U. S. District Court, N. D. West Virginia, February 8, 1924)
(295 Fed. 704)

Record: Revenue Act of October 3, 1917. Action to recover additional excess profits tax paid. Judgment for plaintiff.

Facts: A corporation owned a certain coal lease and other property. It negotiated for the sale thereof with certain individuals, the negotiations culminating in a contract for such sale

dated March 20, 1917, the sale to be consummated on the last day of the month. The contract provided that the conveyance was to be made to the individuals or their nominee as they elected. It was understood that an existing corporation or a corporation to be formed by the individuals should be the real purchaser. Owing to certain exigencies, the legal title was conveyed before the end of the month to one of the individuals for him and his associates, although the vendor continued operating the property and received all the income therefrom until the end of the month. On April 2nd, 1917 (April 1st being Sunday), the property was delivered to the individual as trustee for the associates, and the corporation in process of organization. The organization of such corporation, the plaintiff, was completed on April 21, 1917, and on that date it was delivered a deed to the property, dated April 2, 1917. The purchase price to the original vendor was $125,000 and the assumption by the purchasers of certain possible damages. These individuals borrowed all the purchase price and an amount for working capital and advanced the money required as discount on the notes. Later, all this indebtedness was assumed by the corporation, plaintiff, although the individuals endorsed the corporation's notes therefor. It was contended that the individuals acted for themselves in the original purchase and that the property conveyed to the plaintiff had a value in excess of the purchase price paid the original vendor, constituting invested capital of plaintiff, as did also the actual cash paid in for working capital; that, as the individuals were not acting for the plaintiff, the indebtedness was not borrowed money within the meaning of the act of October 3, 1917, but was in reality the indebtedness of the individuals; and that the credit extended by them in endorsing the corporation's notes constituted additional invested capital.

Questions: (1) In whose behalf was the original purchase made and what was the value to be considered of the property purchased?

(2) Did the plaintiff have an invested capital under the revenue act of October 3, 1917?

Decision: (1) The court decided that the individual "in purchasing the property, was acting on behalf of the plaintiff corporation then in contemplation and speedily organized; that the property was acquired in the usual course of business at a bona fide sale at the price of $125,000, and from all the evidence * * * the sum stated in the contract of March 20, 1917, was a fair and adequate price therefor, and in the absence of fraud the government is bound by it for the purpose of taxation."

(2) "The plaintiff corporation borrowed every cent of this sum and $9,000 additional for operating expenses and some $1,200 advanced by Senator Arnold to pay interest. The small sums paid in on account of stock were at once extinguished for expenses. * * *

"The statute excludes borrowed money from computation as invested capital, and therefore a corporation whose capital is all borrowed has no invested capital and must be taxed under section 209."

ENGLISH & MERSICK CO. v. EATON, COLLECTOR

(U. S. District Court, D. Connecticut, May 2, 1924)
(299 Fed. 646)

Record: Section 326 (a), Revenue Act of 1918. Suit for the recovery of taxes paid under protest, with interest. Judgment for plaintiff.

Facts: Plaintiff's income tax return for 1918 claimed an invested capital, conceded by it at the trial to have been $438,504.72. The Commissioner disallowed $391,892.13 as part of plaintiff's invested capital, and redetermined the taxes and assessed the additional amount of $16,608.92. The plaintiff annually adopted a resolution that the net profits be divided among the stockholders, the amounts thereof to be credited to the "individual surplus accounts standing in the names of the stockholders." Each of the individuals, in his return, included and paid taxes on the distribution. It was stipulated that if the invested capital should be allowed as claimed by the plaintiff, then there had been an overpayment in the amount for which the suit was brought. On the trial, besides said stipulation, there

was introduced evidence that in addition to the capital there was $391,892.13 actually employed in the corporation's business, invested in machinery, etc., incapable of physical distribution without terminating the business. This amount was included in the surplus of the corporation in its statements to its bank and to credit agencies. The government contended that this amount represented, not additional invested capital, but borrowed capital, and that the annual resolutions constituted declarations of dividends, making the stockholders creditors of the corporation for the amounts not withdrawn.

Question: Was the sum in question a part of the corporation's invested capital?

Decision: The court said that neither the government nor the corporation would be bound by the language of any resolution; that when surplus had in fact been distributed, the government would not be bound by a declaration of the corporation that such division constituted a salary payment, and that reason and justice required that the converse of that proposition should also be true. The sum in dispute in this case in fact never was distributed. If the bookkeeping entries indicated the relation of debtor and creditor, the statements made by the individuals to the bank and commercial credit companies indicated the reverse. The statute included in invested capital "paid-in or earned surplus and undivided profits." The ordinary meaning of undivided profits was said to be profits which in fact had not been divided or distributed. The court referred to the obvious intention of Congress to provide by the Act "a graduated reduction of taxes in instances where invested capital is employed. * * * we may indulge the inference that such tax reduction was intended to operate as a compensation for the employment of capital, and that, therefore, one of the actual objects to be attained was to encourage and reward the actual and productive employment of capital. Such employed capital was to be considered 'invested capital' except in instances of borrowed capital."

A declaration of a dividend does not alter the title to the corporation's surplus until there is an actual distribution. "It must be conceded, then, that the title to the assets employed by

the plaintiff in 1918 was in the plaintiff corporation. * * * There was no pretense that the machinery and plants of which they largely consisted were actually loaned to the corporation; it did not borrow them. Nor is there any claim that an actual loan of money was made by the stockholders to the corporation for the purchase of this plant and equipment. * * * A stockholder to whom a dividend has not been paid cannot declare on a loan. He may sue for the dividend, but his action is not for money loaned.

"If, then, these assets were not loaned to the plaintiff corporation, they never were, even in legal theory, divided from the body of the corporate assets. * * * If within the meaning of the Revenue Act a theoretical division of profits is the equivalent of an actual division, then the term 'undivided profits' is tautological, for all retained profits are undivided. If, then, any significance is to be attached to the word 'undivided,' it must be that 'undivided' means undivided in fact, even though not undivided in theory."

The sum in question was held to be a part of the invested capital, and judgment was entered for the plaintiff, with interest.

ERSKINE, COLLECTOR, v. HOHNBACH

(U. S. Supreme Court, December, 1871)
(14 Wall. 613)

Record: Act of July 13, 1866. Plaintiff sued, alleging trespass by collector and conversion of property. Plea in justification as tax collector. Judgment for plaintiff affirmed.

Facts: Collector seized property to enforce an assessment. Section 19, Act of July 13, 1866, provides "that no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner * * * and a decision * * * be had thereon." Plaintiff's declaration did not allege that he had taken an appeal to the Commissioner.

Question: Is appeal to the Commissioner a condition precedent to bringing the action in this case?

Decision: No. "An appeal to the Commissioner from an assessment is only a condition precedent to an action for the recovery of taxes paid. It is not a condition precedent to any other action where such action is permissible."

ERSKINE v. VAN ARSDALE, COLLECTOR

(U. S. Supreme Court, December, 1872)
(15 Wall. 75)

Record: Act of March 2, 1867. Suit for recovery of taxes paid. Judgment for plaintiff. Writ of error. Affirmed.

Facts: The trial judge instructed the jury that the articles in question were exempt from tax under the statute named; that, if the taxpayer notified the collector at the time of payment that the tax was illegal and that he would take measures to recover the payment, action might be maintained for all the taxes paid and that the jury might add interest if they found for plaintiff. These instructions were claimed as erroneous in the collector's writ.

Question: May an illegal tax and interest be recovered where the taxpayer notifies the collector that he will sue for the recovery?

Decision: "Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them. * * * The ground for the refusal to allow interest is the presumption that the government is always ready and willing to pay its ordinary debts. Where an illegal tax has been collected, the citizen who has paid it, and has been obliged to bring suit against the collector, is, we think, entitled to interest in the event of recovery, from the time of the illegal exaction."

FARMERS LOAN & TRUST COMPANY v. WINTHROP

(New York Court of Appeals, July 5, 1924)
(238 N. Y. 477)

Record: Sections 401, 402, 403, 407 and 408, Revenue Act of 1918. Suit involving question as to whether executors should pay that part of estate tax imposed because of a transfer by deed

to take effect at death. The judgment of the appellate division was modified so as to affirm judgment entered on the report of the referee.

Facts: In June, 1918, Mrs. Bostwick deeded certain property of great value to the company in trust, the income to be paid her during her life and then the principal to be distributed to certain grandchildren. She died in April, 1920, and thereupon the transfer to the grandchildren became taxable as a part of her estate. Over a year after creating the trust estate she made a will in which she provided that "all inheritance taxes be paid out of my general estate".

Question: Should all or any part of such tax be paid out of the trust estate or should it be paid from the donor's general estate without reimbursement from the trust estate?

Decision: The court construed the words quoted from her will to apply only to property transferred by the will and to provide that the tax should be paid from the general or residuary estate even though the statute required that the tax ordinarily be payable by the legatee out of the legacy received. The administratrix "has not indicated that she had in mind any question of who should pay any tax imposed on the transfer of property passing under a deed of trust executed by her". The tax is on the transfer of the net estate, in which shall be included the value of property which the decedent had transferred and which was "intended to take effect in possession or enjoyment at or after his death". Section 407 provides that "the executor shall pay the tax," and if the tax is not paid provision is made under Section 408 for its collection out of the gross estate, and if the tax is paid from a part of the estate passing to any person other than the executor in his capacity as such, that "person shall be entitled to reimbursement out of any part of the estate undistributed," etc. The court said that "it would be anomalous to impose upon a beneficiary the burden of a tax which is graduated solely by the capacity to pay of the donor". The tax "under the statute is a 'tax upon the transfer of the net estate of every decedent'. The value of the net estate by which this tax is measured not only includes the value of property which the dece-

dent at the time of his death could dispose of by will or deed and the value of property which the decedent has transferred by deed made in contemplation of death, or to take effect in possession or enjoyment upon his death, but also includes the value of interests of others which ripen upon his death into new rights of possession and enjoyment by operation of law regardless of the wish of the decedent, such as dower rights or interests held jointly or as tenants by the entirety. The transfer which is taxed is not the transfer of separate parts of the decedent's estate by a single instrument nor separate transfers by the decedent of his estate, but it is the transfer by death of all that property which is defined by the statute as the 'net estate' regardless of how the right of the transferees may arise. * * * Congress has explicitly stated that it was the intent and purpose of the act that 'so far as practicable and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before distribution' (Section 408); in other words, unless the testator otherwise directs, the whole tax is to be paid so far as practicable out of the estate before the amount remaining in the estate for distribution thereafter can be determined or the amount of a residuary bequest fixed.

"We do not here attempt to decide in what cases it would not be 'practicable' to adopt this method of payment. We decide that it is practicable in regard to that portion of the tax which is imposed because the net estate included property which the decedent transferred under a revocable deed of trust to take effect in possession or enjoyment at the death of the decedent, where the decedent has left a residuary estate after the payment of all specific bequests more than sufficient to pay the entire tax. Since we have construed the will as not containing any direction as to payment of any tax on property which does not pass under the will, it follows that the executor is bound to pay the entire Federal estate tax without right to reimbursement, but he is entitled to reimbursement where he has paid the State taxes which are imposed upon the transfer of the trust estate to the beneficiaries and not upon the transfer of the decedent's estate as a whole upon his death. * * *"

FARRELL et al. v. UNITED STATES

(U. S. District Court, E. D. Arkansas W. D., February 20, 1909)
(167 Fed. 639)

Record: Act of June 13, 1898, and Section 3227 R. S. Suit under the Tucker Act of March 3, 1887, to recover legacy tax paid. Judgment for defendant.

Facts: Plaintiffs sued for legacy taxes paid by the administrator of their mother's estate. Besides denying the allegations of the declaration, defendants pleaded the statute of limitation of two years under Section 3227 R. S. The court found that plaintiffs were the sons and the sole heirs at law of the deceased, who died June 3, 1901; that Davis was appointed administrator on July 23, 1901; that on February 11, 1903, the estate was assessed under the Act of Congress of June 13, 1898, $901.86 taxes; that that assessment was on the total value of the personal property in the estate, which exceeded $10,000; that the tax was paid without protest by the administrator on February 24, 1903; that the estate was distributed to the heirs on September 29, 1903; that until then they were not in actual physical possession or enjoyment of their respective shares or any part thereof; that on December 27, 1907, plaintiffs filed a claim for refund, which was rejected; and that this suit was instituted September 22, 1908.

Section 29 of the Act of June 13, 1898, as amended by the Act of March 2, 1901, provided a tax on legacies arising from personal property passed by will or the intestate laws, etc. Section 30 provided that the tax should be "due and payable in one year after the death of the testator". The Act of April 12, 1902, repealed said Section 29, the repeal to take effect July 1, 1902. The Act of June 27, 1902, provided that when an executor, administrator or trustee should have paid or should thereafter pay any such legacy tax the Secretary of the Treasury was authorized to refund, upon proper application, so much of the tax as may have been collected on contingent interests "which shall not have become vested prior to July 1, 1902, and no tax shall hereafter be assessed or imposed under said act" on a contingent interest which shall not become absolutely vested in possession or enjoyment before July 1, 1902.

Questions: (1) Were these interests contingent interests which did not become vested prior to July 1, 1902?

(2) Does the limitation in Section 3227 R. S. prevent a recovery?

Decision: (1) Under the laws of Arkansas the title to all personalty of a deceased person vests in the executor or administrator and he is the only person authorized to collect debts and maintain actions for the estate. Creditors of the estate have two years to present their claims and the executor or administrator is not compelled to pay legacies or distributive shares until said two years expire, unless ordered by the court, when a refunding bond may be required. The two years within which creditors could exhibit their claims in this estate expired on July 23, 1903. There could be properly no assessment of the tax until the expiration of that two-year period, as in the meantime "it is impossible to determine how much, if anything, will go to the heirs." This tax was assessed over seven months after the repeal of the act had taken effect. To subject the estate to this tax "the estate must be absolutely vested in the heir, or at least his right to receive it must be absolute, or, if not entitled to the possession, entitled to its enjoyment, and if the latter, then the tax is on the value of the estate he is permitted to enjoy under the devise".

(2) The Government contended that the action was controlled by Sections 3226, 3227 and 3228, R. S., and plaintiffs contended that the Act of June 27, 1902, was a refunding act and no provision was made for the recovery of the tax in case of a wrongful refusal by the Secretary of the Treasury, so that the only remedy would be by action under the Tucker Act, under which the limitation is six years.

"Internal revenue taxes voluntarily paid cannot be recovered by suit unless the provisions of Sections 3226, 3227 and 3228 have been complied with. * * * The collection of the tax in 1903 was clearly illegal and without authority of law. As every one is presumed to know the law, the plaintiffs are presumed to have known it, and their duty was to make protest at the time, and in any event to institute the action to recover the money paid within two years from the time of the payment."

FARRINGTON v. TENNESSEE et al.

(U. S. Supreme Court, January 14, 1878)
(95 U. S. 679)

Record: Article 1, Section 10, Constitution of the United States; special Act of Tennessee incorporating bank. Writ of error to the Supreme Court of Tennessee to review a judgment holding a State tax valid. Reversed and remanded.

Facts: Farrington was the owner of 150 shares of stock of a bank which had received a special charter from the State of Tennessee, providing that it should pay an annual tax of 1½ per cent "on each share of the capital stock subscribed, which shall be in lieu of all other taxes." The State and the county of Shelby claimed the right to tax the stock of Farrington under the general revenue law of the State.

Question: Does the charter provision constitute a contract protecting a stockholder of the bank from further taxation on his shares?

Decision: The court said that the tax specified in the charter provision was a tax upon each share of the capital stock, and not upon the capital stock itself, and that this tax was declared to be "in lieu of all other taxes." When the charter was granted the State had the power to make its own terms, or to refuse the charter. "It chose to stipulate for a specified tax on the shares, and declared and bound itself that this tax shall be 'in lieu of all other taxes'."

The decree of the Supreme Court of Tennessee was reversed and the cause remanded, with directions to enter a dcree in favor of Farrington.

FERGUSON, COLLECTOR, v. DICKSON et al., EXECUTORS

(U. S. Circuit Court of Appeals, 3rd Cir., March, 1924)
(Not yet reported)

Record: Section 402 (c), Revenue Act of 1918. Suit for recovery of estate tax paid under protest. Defendant's motion to strike out complaint was denied and leave was given him to answer within a specified time. In default of such answer judgment was rendered for plaintiff. Affirmed on writ of error.

Facts: In consideration of the marriage about to be entered into between them, Dickson and Miss Maran made an antenuptial contract between themselves and the Central Trust Company. By this agreement, Miss Maran released to him all rights in his property, and he transferred to the trust company $500,000 of face value of bonds in trust, the income to be paid him until his death, then to his wife if she survived him, and upon her later death, or in case she did not survive him, then to certain designated individuals. The marriage took place April 11, 1917, six days after the execution of the contract. He died on December 12, 1919. The executors omitted these bonds in their Federal estate tax return. Later the Commissioner included them and the increased tax thereon was paid under protest. The executors claimed that the tax was wrongfully assessed to the extent of the widow's life interest in these securities. Their claim for refund of that amount was rejected and then they brought this suit. The act provided that in determining the value of the estate of a decedent there should be included all property to the extent of any interest therein of which the decedent had at any time made a transfer or with respect to which he had created a trust in contemplation of death or intended to take effect in possession or enjoyment after his death "except in case of a bona fide sale for a fair consideration in money or money's worth." There is "no question that Mr. Dickson made a transfer and created a trust in favor of his intended wife, the possession and enjoyment of which were to take effect after his death."

Questions: (1) Was this transfer a sale?

(2) Was the consideration fair?

(3) Was it in money or money's worth?

Decision: (1) The court gave a number of definitions of a sale and then said of the transfer in question that the exact amount which the intended wife should receive was dependent upon the happening of some one of the various contingencies set out in the contract. "In return for this new property right, she absolutely extinguished her inchoate right of dower in everything that he then had or might thereafter acquire.

"We think that this transaction constituted a sale. The husband absolutely sold his right in the securities as defined and limited in the contract, and the intended wife purchased them with the property constituting her inchoate right of dower. Her dower rights in all his property and his rights in the securities within certain limits, which would inevitably become definite, were gone forever."

(2) "Was the consideration fair? It must be readily admitted that it was fair in the sense that it was free from fraud or intention of the parties to evade the payment of taxes. It was also fair in the sense that there was no concealment of any fact, relating to the consideration, by one from the other, or by either from the Collector. It is to be observed that Congress in this act used the word 'fair' as distinguished from the word 'adequate' as used in the Internal Revenue Act of June 30, 1864 (13 Stat. 218, 288, Sec. 132) and the word 'full' as used in the Massachusetts Act. * * * We think Congress, in using the words 'fair consideration' meant to distinguish them from 'adequate consideration' as used in the Act of 1864. Otherwise it would have used the word of the former act. 'Fair consideration' means a consideration which under all the circumstances is honest, reasonable and free from suspicion, whether or not strictly 'adequate' or 'full'."

(3) "Mr. Dickson at the time of his marriage was fifty-six years of age. He was a rich man and, while the bulk of his property was personal, it is not unreasonable to suppose that it might become real before the time under mortuary tables he would be expected to die. Again, it was entirely possible that he might become a resident in a jurisdiction, Pennsylvania, for instance, in which his wife would have in his personal property an interest that he could not defeat by will. In either of these contingencies the consideration in this case might become not only unfair to the wife, but also inadequate. We think that in view of all the circumstances the consideration was fair.

"* * * Inchoate right of dower is the separate property of the wife and has pecuniary value and is money's worth."

The judgment of the district court was affirmed.

FERRIS v. CHIC-MINT GUM COMPANY

(Delaware Court of Chancery, May 23, 1924)
(124 Atl. 577)

Record: Section 3186, R. S. Suit against company, in which a receiver was appointed. Petition by Wilmington Trust Company for order for payment by receiver of bond and mortgage. Manner of distribution of funds between claimants directed.

Facts: The petition represents that the Wilmington Trust Company is the holder of a mortgage given it by the insolvent defendant. The mortgage was dated and was recorded September 12, 1922. The premises upon which the mortgage was a lien were sold by order of court, free of the lien of the mortgage, the mortgagee consenting thereto and agreeing that its lien might be transferred to the proceeds of the sale. Such proceeds were insufficient to meet all the claims against them, which included those of (1) the receiver for expenses, allowances and costs; (2) the petitioner for its mortgage; (3) the United States for taxes; (4) the State, county and city for local taxes; (5) judgment creditors, and (6) general creditors. Notice of the Government's lien for taxes had not been filed with the District Court.

Question: Was the Government's claim for taxes entitled to be paid prior to the mortgagee, judgment creditors or taxes of the State, county and city?

Decision: The court quoted Section 3186, R. S., which gives a lien for Government taxes "provided, however, that such lien shall not be valid as against any mortgagee, purchaser or judgment creditor until notice of such lien shall be filed by the Collector in the office of the clerk of the District Court." The Government contended that the rule in this statute did not apply because the mortgage in this case was given to secure an antecedent debt so that the "mortgagee is not in the position of a bona fide purchaser for value." The court held that the equitable doctrine of bona fide purchaser for value without notice was not applicable to such a situation as this. The taxes were not liens as against the mortgagee unless "the statute is to be so

interpreted as to read into it a qualification confining the term 'mortgagee' to that class whose mortgages were obtained to secure a contemporaneous debt, and excluding from its scope that class, of whom this mortgage is one, whose mortgages were obtained to secure an antecedent indebtedness. It is admitted that the term 'mortgagee' is broad enough in its literal meaning to embrace the petitioner in this case. Nothing has been adduced here which would justify the court in going over into the field of unrelated equitable doctrines to borrow an idea as justification for writing into the language of the act something by way of exception which the Congress itself saw fit to omit. * * *

"The Government's claim being for taxes automatically arose. It was in no wise induced or procured to be incurred by the prior mortgagee. This being so, what ground can there be for the Government to contend that there is occasion for equity to accord to it the favored position of one who has become an innocent purchaser for value?

"With respect to State, county and city taxes and sewer liens, it is conceded that the law of this State places them ahead of local liens on the real estate." As the local taxes were entitled to payment ahead of the mortgage, which was prior to the Federal tax, the local taxes would necessarily be paid prior to the Federal tax.

The claims of judgment creditors are given priority over the Federal taxes by Section 3186, R. S.

The United States Solicitor had conceded that the costs, expenses and allowances to the receiver constitute a prior charge to that of the Government for taxes.

FIDELITY & DEPOSIT COMPANY v. UNITED STATES

(U. S. Court of Claims, November 5, 1923)

(58 Ct. Cls. 723)

Record: Section 2, Act of June 13, 1898, and Act of July 27, 1912. Application in the Treasury Department by the company for the refund of a special banker's tax assessed under the Act of June 13, 1898. Application rejected. Upon a mandate of the U. S. Supreme Court (259 U. S. 296, ante 887) the Court of Claims

submitted an additional finding of facts with its conclusion of law. (Pending in Supreme Court.)

Facts: The company was organized as a Maryland corporation, with its principal offices in Baltimore. It had several departments of business, including a surety business, a banking business, a safe-deposit business and a business as trustee upon bond issues by other corporations. A part of its capital was invested in the Baltimore office building, a part of which building was used for its banking business. Its capital for the four years prior to June 30, 1901, ranged from $1,000,000 to $2,000,000, and its surplus in that time had ranged from $1,000,000 to $2,550,000. The profits from investment of deposits during that time, above amounts paid the depositors, ranged from about $43,000 to about $93,000. The Commissioner had required the company to submit returns in each of these years and to pay a special banker's tax for the four years, aggregating $8,300. Under authority of the Act of July 27, 1912, the company made application for the refund of this amount. The application was rejected.

The additional findings were that the banking department of the company used only the funds of its depositors in its banking business; that the deposits were invested in securities which were the property of the bank; that none of the capital or surplus of the company was used in the banking business, except that portion of the building used for banking purposes; that the rental value of such portion of the building was $6,000 per annum, and that the amount of tax to which the United States is entitled is $180 for each of the said four years.

Question: What portion, if any, of said tax should be repaid the company?

Decision: The court concluded that $7,580 should be returned to the plaintiff, with interest from May 22, 1914, until paid. (See ante 887.)

FIDELITY TRUST COMPANY v. LEDERER, COLLECTOR

(U. S. Circuit Court of Appeals, Third Cir., July 5, 1923)
(289 Fed. 1009)

Record: Revenue Act of 1918. Suit to recover stamp taxes paid under protest. District Court for the Eastern District of

Pennsylvania entered judgment for the defendant (276 Fed. 51). Judgment reversed. (Certiorari granted, 263 U. S. 695.)

Facts: The Government assessed and collected stamp taxes upon car equipment trust certificates issued under what is known as the Philadelphia plan. The certificates stated thereon that they were payable only out of the rentals under the lease referred to in the certificates. The trust company rented 500 steel cars to the Interstate Railroad Company and the certificates provided for the right of the holders to participate in the rental payable under the lease.

Question: Were such certificates required to be stamped as bonds of indebtedness under the Revenue Act of 1918?

Decision: The certificate in question is simply a certificate of the right of its holder to participate in a rental payable under a certain lease, which lease restricts the right of the certificate holder to payments solely " 'from and out of the deferred rentals when paid as provided for in a lease of 500 steel cars, made by Fidelity Trust Company, Trustee, to Interstate Railroad Company, bearing date the second day of February, 1920, which rentals are payable to the trustee for the benefit of the holders of this and other certificates amounting at par to $900,000, to which lease and the agreement hereinbefore mentioned reference is made for a statement of the rights of the holders of such certificates.' * * * It will thus be seen that, when the transaction is viewed as a whole, * * * and the certificate in question measured from that standpoint, no indebtedness is involved or obligation incurred by the trustee to the holder, but it is simply a certificate of the holder's right to proportionate participation in a rental when paid."

FINK v. O'NEIL

(U. S. Supreme Court, December 11, 1882)
(106 U. S. 272)

Record: Revised Statutes, Section 916, and the Homestead Exemption Law of Wisconsin. Bill for injunction in the U. S.

Circuit Court in Wisconsin. Demurrer. Demurrer overruled and injunction granted. Appeal. Affirmed.

Facts: Bill for injunction was filed by O'Neil against Fink, United States marshal, to restrain him from proceeding further in connection with a levy on certain real estate under a judgment of the United States. The real estate was claimed to be exempt under the Wisconsin law, as a homestead.

Question: Does the Wisconsin Homestead Law provide an exemption from execution on a judgment of the United States?

Decision: Section 916, R. S., provided that a party recovering a judgment in the U. S. courts should be entitled to similar remedies upon same as were then provided by the laws of the State in which the court was held or such State laws thereafter enacted as should be adopted by general rules of the United States courts. The court said that as the Homestead Exemption Law of Wisconsin was in force when this Federal statute was adopted "it also follows that the exemption has thereby become a law of the United States within that State, and applies to executions issued upon judgments in civil causes recovered in their courts in their own name and behalf, equally with those upon judgments rendered in favor of private parties."

FIRST NATIONAL BANK OF ABERDEEN v. COUNTY OF CHEHALIS

(U. S. Supreme Court, April 12, 1897)
(166 U. S. 440)

Record: Section 5219, R. S., and Act of the State of Washington, March 9, 1891, taxing national bank stock. Bill by a national bank to enjoin collection of taxes on its stock. Judgment for defendant. Writ of error to the Washington Supreme Court, which had affirmed the judgment of the lower court. Affirmed.

Facts: The bank sought to enjoin the tax collector for the county from levying on safes, etc., to collect the tax, penalty and interest upon its shares of capital stock. Defendant's demurrer was sustained and judgment in his favor was entered. The Su-

preme Court of the State affirmed this judgment. The bank's contentions were that its stock was owned partly by nonresidents; that other property in the county not assessed consisted of loans and securities; that other property in the State not assessed consisted of stocks and bonds of insurance, wharf and gas companies; that these omissions were knowingly made and operated as discrimination against shares of stock of national banks, taxing them at a higher rate than other capital; and that the taxation to the bank of all its shares constituted a tax upon the bank forbidden by Section 5219, R. S.

Question: Was the requirement that the bank should pay this tax as agent for its shareholders illegal as forbidden by Section 5219, R. S.?

Decision: The tax was against the shareholders instead of against the bank, the latter being required to pay as agent for them; and prior decisions of the U. S. Supreme Court had allowed a State to do this even as to nonresident owners. The court said: "The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments, and investments in mortgages, does not come into competition with the business of national banks, and is not, therefore, within the meaning of the act of Congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks; and that exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by section 5219 of the Revised Statutes of the United States."

Stocks and bonds of insurance, wharf and gas companies are not those of competitors for business with national banks, "and therefore might be legally exempted." As to the allegations regarding other investments, "we may well assume that they belong to a class of investments which does not compete with the

business of national banks." The statement that such investments were taxable is a statement of a conclusion.

FIRST NATIONAL BANK v. KENTUCKY

(U. S. Supreme Court, March 28, 1870)
(76 U. S. 353)

Record: Petition in state court by state for a certain tax. Upon demurrer, the court dismissed the petition. Appeal to the Court of Appeals of Kentucky. Reversed. Writ of error. Affirmed.

Facts: The state sued the bank to recover the amount of a tax of 50c per share on its shares of stock. The suit resulted in a judgment for the state in the Court of Appeals. The taxing statute imposed on bank stock, etc., a tax of 50 cents "on each share thereof, equal to $100 of stock therein, owned by individuals, corporations or societies."

Question: Is the tax valid and may the bank be required to pay it?

Decision: This was held to be a tax on the stockholders, despite the fact that the law required the officers of the bank to pay it for the shareholders. Such a practice exists in the New England states." The mode under consideration is one which Congress itself has adopted in collecting its tax on dividends and on the income arising from funds of corporations. * * * It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the states to levy."

FLANNERY et al. v. UNITED STATES

(U. S. Court of Claims, May 19, 1924)
(Not yet reported)

Record: Revenue Act of 1918 and Article 1561, Regulations 45, originally and as amended by T. D. 3206. Suit for recovery of additional taxes paid. Judgment for plaintiff. (Pending in Supreme Court.)

Facts: Plaintiffs are the executors of the estate of James J. Flannery, deceased. James J. Flannery acquired certain shares

of stock of Flannery Bolt Company before March 1, 1913, at less than \$225 a share. On March 1, 1913, the fair market price was \$275 a share. He sold this stock in 1919 for \$225 a share. He died March 6, 1920. His executors filed a return of his income for 1919, claiming a loss on said sale of the difference between the fair market price on March 1, 1913, and the price received. The collector demanded an additional tax, \$7,440.67 of which was attributable to the disallowance by the Commissioner of said loss. This was paid under protest and a claim for refund was rejected. This suit was then brought.

Question: Was this a deductible loss?

Decision: The court quoted Section 202 (a) of the Revenue Act of 1918 and said of the basis for gain or loss, that "in the case of property acquired before March 1, 1913, this basis is the fair market price or value of such property as of that date. With this value found and the sale price fixed, the loss sustained, if any, is the difference between these amounts. * * * The losses sustained which are authorized to be deducted are losses ascertained as the act required. It thus defines what are deductible losses. They are not required to be such as could arise if the property were sold for less than it cost. Congress could have required that such a loss be shown, but it did otherwise."

The court said the view it had taken was in keeping with the Treasury regulations in force until July 28, 1921, when T. D. 3206 was promulgated, and that the cases of Goodrich v. Edwards, 255 U. S. 527 (ante 234) and Walsh v. Brewster, 255 U. S. 536 (ante 592) dealt with the question of gain in the Act of 1916 and did not discuss nor ascertain whether a loss claimed and ascertained "as in this case is a proper deduction in computing net income of the individual under the Revenue Act of 1918. That the right to tax income and the right to authorize deductions are governed by different considerations is manifest."

Judgment was given for plaintiffs.

FLEISCHMANN MANUFACTURING COMPANY v. IRWIN, COLLECTOR

(U. S. District Court, S. D. New York, June 29, 1923)
(293 Fed. 267)

Record: Revenue Act of 1917. Action to recover excise taxes paid under protest. Judgment for the defendant.

Facts: The Revenue Act of 1917 went into effect October 4th of that year. Prior to that date the plaintiff had manufactured a large quantity of gin and stored it in barrels at 140 proof in a bonded warehouse. It was taken from the warehouse and the distiller's tax paid and taken to a reducing house where distilled water was added to reduce it from 140 to 95 proof. The addition of the water threw the essential oils out of solution. It was then pumped to the top floor of the building to a Kiefer filter and the cloudy precipitate caused by these oils was removed by filtration. This last process was a rectification not accompanying redistillation.

Section 304 of the Act of 1917 exempted from the 15 cent tax "gin produced by the redistillation of a pure spirit over juniper berries and other aromatics."

Question: Was the method of redistillation such as to take it within the terms of the exemption of Section 304 of the Act of 1917?

Decision: The court held that the tax was properly assessed upon the grounds (1) that the process of removing the cloudy precipitate by forcing the gin through a Kiefer filter is rectification not accompanying redistillation and it differs from merely straining foreign matter from a spirit as in the case of Mayes v. Paul Jones & Co., 270 Fed. 121 (post), and (2) that the process was not redistillation "over juniper berries and other aromatics," the berries in the instant case being placed in the pure spirits and boiled, followed by redistillation.

FORE RIVER SHIPBUILDING CORPORATION v. COMMONWEALTH

(Supreme Judicial Court of Massachusetts, February 29, 1924)
(142 N. E. 812)

Record: Massachusetts corporation excise tax law. Petition for recovery of a tax. "On report of a single justice, who ruled that petitioner was entitled to recover." Petition dismissed.

Facts: Petitioner, a Massachusetts corporation, was organized for the purpose of building ships, etc. In 1917 substantially all its stock was owned by a Pennsylvania corporation. The Bethlehem Shipbuilding Corporation, Ltd., was organized under the laws of Delaware for the purpose of consolidating the petitioner with other corporations owned by the Pennsylvania corporation. Petitioner leased its real estate and plant to the Bethlehem corporation and sold and conveyed to that corporation all its remaining assets excepting only "certain contracts with the United States Government which are not assignable" and a railroad not material to the present case. Petitioner and the Bethlehem corporation entered into an agreement by which the former employed the latter as its agent to perform and complete certain contracts therein specified, petitioner to pay the Bethlehem corporation all moneys as and when received on such contracts.

Question: Was petitioner carrying on or doing business so as to be liable to the Massachusetts excise tax?

Decision: It was found that after November, 1917, it was the purpose and endeavor of the petitioner to cease from doing any business whatever and it did none unless the carrying out of its contracts through the agency named constituted the doing of business. "Mere possession of the franchise to be a corporation is not made subject to this tax. * * * It is the carrying on and doing of business alone upon which is levied the present excise. It may be assumed that, when a corporation has leased all its property and assets and does nothing more than to receive and distribute the rental among its stockholders, it is not carrying on or doing business. * * * The petitioner was doing much more. It was the principal in its contracts with the government of

the United States. The United States of America recognized it and it alone as under obligation to complete government contracts to which it was a party. In order to secure continuity of liability of the petitioner from the beginning to the completion of all such contracts, the government provided that the petitioner could in no way assign such contracts. * * * All payments under the contracts were due and were made to the petitioner alone. * * * Whatever one does by another, he does by himself so far as concerns legal responsibility. * * *

"Performance of live contracts, the obligation of which is to build ships by the instrumentality of an agent, is conduct of unmistakable meaning. It is the doing of business."

Petitioner was held to be "carrying on or doing business" under the statute.

FORT PITT GAS CO. v. UNITED STATES

(U. S. Court of Claims, January 12, 1914)

(49 Ct. Cls. 224)

Record: Act of 1898; Section 156 Judicial Code; and Section 3227, Revised Statutes. Suit to recover certain taxes assessed and paid under Section 27 of War Revenue Act of 1898. Petition dismissed.

Facts: Plaintiff is a corporation engaged in development and transportation of natural gas. Tax was levied on gross receipts exceeding $250,000, and paid under protest on August 1, 1903. On the 28th of August the corporation filed a claim for refund for $69.78, and on November 20, 1906, it filed a second claim for $1,813.81.

The Commissioner allowed the first claim on May 22, 1907, but denied the second on the ground that the Statute of Limitations barred it.

Question: Does the general statutory period, Section 156 Jud. Code, of six years apply or the limitation of two years fixed by R. S. 3227?

Decision: Two years is the statute period. "The general statute of limitations of actions in this court, section 156, Judicial Code, prescribes that a claim is barred unless the petition be

filed 'within six years after the claim first accrues.' This statute, fixing a rule applicable to cases generally, is not necessarily inconsistent with the sections of the Revised Statutes above mentioned, which fix the limitation for a particular class of cases 'in any court.' * * * We hold that the limitation fixed by Section 3227 R. S. is applicable and not the six year limitation of Section 156 Judicial Code."

FOSS-HUGHES CO. v. LEDERER, COLLECTOR

(U. S. District Court, E. D. Pennsylvania, September, 1919)
(287 Fed. 150)

Record: Revenue Act of October 3, 1917. Action against the collector to recover an excise tax paid. Judgment for the defendant.

Facts: Section 600 of Act of October 3, 1917, provided for the collection of a tax upon all automobile trucks sold by the manufacturer, producer, or importer thereof. The plaintiff purchased the chassis from the manufacturer and had the body added by a maker of bodies, and then sold the completed truck.

Question: Was the plaintiff a producer of automobile trucks?

Decision: "Unquestionably the automobile truck was produced. The maker of the chassis did not produce it, nor did the manufacturer of the body. One of the three parties concerned was the producer (if there was one), and he must be the plaintiff. The only escape from this conclusion is that not one of them was the producer, but it was a joint product of all. The taxpayer is one who both produces and sells. This plaintiff admittedly sells, and it is through it that what it sells is brought into existence. The fact that personally it does not make chassis or body and does not even assemble, is not controlling."

FOX. v. EDWARDS, COLLECTOR

(U. S. Circuit Court of Appeals, Second Cir., January 30, 1923)
(287 Fed. 669)

Record: Section 252, Revenue Act of 1918. Writ of error to U. S. District Court, which sustained a demurrer to the plaintiff's bill of complaint (280 Fed. 413; ante 896). Affirmed.

Facts: The money for the recovery of which suit was brought was paid voluntarily in March, 1919, as a part of the plaintiff's income tax for the year 1918. After such payment, the plaintiff discovered that he had not taken a loss to which he was entitled. This item of loss, upon account of which the plaintiff claimed a refund, was not called to the attention of any Government official prior to March, 1921.

Question: May a tax paid voluntarily and without protest be recovered by suit brought against the collector?

Decision: The original tax having been transmitted to the Government without protest or complaint upon the part of the plaintiff, as against the collector, there could be no recovery at common low nor under the statutes relating to him or his office. There is nothing in Section 252 of the Revenue Act of 1918 which would relieve the plaintiff from the effect of having voluntarily paid an amount of taxes against which he might have offset a bad debt. Without an express statutory provision there is no right of recovery in such a case. The court recognizes the right to recover in an action at law, in a proper case, money illegally exacted for taxes, but points out that such recovery is allowed on the ground of implied assumpsit. Where the party pays the tax by compulsion of law or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back if the assessment was erroneous or illegal.

Section 252 has nothing to do with the Collector. The power or duty to make refunds under that section is vested in the Commissioner. The section was intended "to protect the Commissioner in making refunds which ought to be made, even though no claim for refund was filed, or though the two-year period for filing claims * * * had expired."

FRICK et al. v. LEWELLYN, COLLECTOR

(U. S. District Court, W. D. Pennsylvania, June 5, 1924)
(298 Fed. 803)

Record: Sections 401, 402 (f) and 408, Act of 1918. Suit for the recovery of an estate tax paid. Judgment for plaintiffs

with interest and costs. (A writ of error was sued out in this case in August, 1924.)

Facts: At the time of testator's death there were outstanding certain policies of insurance on his life, four payable to his wife and seven to his daughter, aggregating $474,629.52. This amount less $40,000 was included in the gross estate of decedent, which exceeded $10,000,000 in amount, exclusive of the insurance, so the tax rate of 25 per cent became applicable and the additional tax on account of this insurance was $108,657.38. The policies were taken out at various times from eighteen to forty-four years before the death of decedent. If the tax were valid, 89 per cent thereof would fall on the beneficiaries under the policy.

Question: Is the provision of the law constitutional which imposes an estate tax upon the proceeds of life insurance policies payable to third parties?

Decision: The court said that the act undertakes to impose a transfer tax, ascertained by including in the gross estate amounts which the executors never received, and were not entitled to receive, but which were received by the wife and daughter as insurance upon his life. The words of the statute include in the gross estate insurance policies which form no part of decedent's estate. Section 408 provides that the executors may collect from the beneficiary of such a policy a proportionate share of the estate tax against the whole net estate, including therein the excess of such policies over $40,000. The rate of that tax would depend entirely upon the size of the estate.

"If it be true that the policies in question, on the death of decedent, did not pass from decedent's estate by will, descent or distribution, and that no transfer of them was in contemplation of death, within the meaning of the Act, they would not be subject to a tax imposed, either directly or indirectly, upon the transfer of the net estate of the decedent. Congress could impose a tax on such property, but not under the guise of an excise tax. * * *

"It is not debatable, therefore, that those policies in this case, which named Mrs. Frick as beneficiary with no power reserved to change the beneficiary, vested in her absolutely. It is scarcely less clear that those policies made payable to the personal representatives of the insured, but which were afterwards assigned by him, in his lifetime, without reservation in the assignment or policies, to revoke the assignment, vested absolutely in his wife and daughter. Nor do I doubt that in those policies which contained no provision on the subject, but in which Mr. Frick by agreement with the company substituted his daughter as beneficiary, reserving no right to further change the beneficiary, the daughter's rights became vested at once. And finally, I am of the opinion that in the three policies in which the assured reserved a right to revoke the assignments to his wife and daughter, but never did so, the rights of the assignees were vested and absolute; that those rights vested immediately under the assignment subject to a limitation; not a conditional estate, vesting at the time of death, but an estate which vested at once, subject to be divested by the happening of an uncertain future event. As that event did not occur, there was no divestiture. * * *

"The Act undertakes to impose the tax upon the transfer of the net estate of the decedent, an excise on its passing as the result of death, as distinguished from a tax on the property itself. Here, there is no transfer at death, no passing of the property, upon whose value the percentages of taxation are based. * * * Estate excise taxes are based on the power to transmit or the transmission from the dead to the living; while legacy or inheritance taxes are based on the transmission or the right to receive the property in question. Here, the right of the beneficiaries to receive the insurance did not spring from the death of the testator. Their rights arose under contracts of insurance. The date of death is simply the time when the insurers became obligated to pay, and the beneficiaries entitled to receive the proceeds of the policies under their contract. What Congress did under Section 402 (f) was to impose a tax upon property, not an excise tax upon the happening of an event."

The imposition of the tax and the collection thereof from plaintiffs were held to be without authority of law and in violation of the plaintiffs' constitutional rights and they were given judgment, with interest and costs.

GALVESTON, H. & N. RY. CO. v. HOUSE et al.

(U. S. Circuit Court of Appeals, 5th Cir., May 30, 1900)

(103 Fed. 168)

Record and Facts: This case was tried with four other cases. A creditor filed a bill for the appointment of receivers for a railroad. Receivers were appointed and receivers' certificates were issued to raise money for necessary improvements and additions, the court order authorizing them declaring them to be first liens on the property after deducting the expenses of the receivership and the operation of the railroad, "said lien to be prior and superior to all other liens upon said property of whatsoever nature." Another bill was filed for condemnation and distribution. Cross-bills were filed asking foreclosure. A decree was rendered, finding the indebtedness to each party and ordering a sale of the property. The property was sold and the questions herein arose as to the relative rights to the proceeds, it having been decreed that the liens, etc., attached to the proceeds the same as they had originally attached to the property.

In this particular case, the specification of errors challenged the ruling of the Circuit Court refusing to allow state and municipal taxes, with interest, penalties and costs to be paid out of the fund in the court. The contest was between the purchaser of the railway and the holders of claims to which priority had been adjudged. The purchaser claimed that the taxes should be paid out of the earnings or out of the proceeds arising from the sale of the property. The other side contended that there was no warranty of title and that the purchaser took the property subject to the encumbrances. (Certiorari was denied in 179 U. S. 686.)

Question: Where property under receivership is sold by order of court, subject only to certain liens specified, not including taxes, the order further providing that all liens on the property should thereafter attach to the proceeds of the sale, is such

fund liable for the payment of such taxes and penalties, interest and costs?

Decision: The taxes under the state laws were a lien upon the property and such liens are prior to all other liens whatsoever, except judicial costs, but there is an exception where the decree for sale provides for the satisfaction of liens out of the proceeds of the sale "or other funds in the registry of the court." The decree for sale in this case provided that the purchaser should take the property "subject only * * * to the liens, in respect to the portions of the property enumerated, to the burden of which such sales were specially herein directed to be made," and all parties and persons claiming under the railway since the execution of the mortgages "are hereby forever barred and foreclosed" of all right, etc., in the property directed to be sold, and all liens, etc., "shall be transferred to the proceeds of the sale." The decree "does not, in *haec verba,* provide that the purchaser should take the property relieved of the taxes, but that seems to be the plain meaning of the language employed." The purchaser "has the right to resort to the fund in court to secure the payment of the taxes due," and thus relieve the property of the tax encumbrances. As there was sufficient money in the registry of the court, above the judicial costs, and as the lien for taxes was prior to everything else, interest, penalties and costs were also allowed to be paid from this fund.

The decree apealed from was amended to direct the payment out of the fund in court of the state and municipal taxes, with interest, penalties and costs. Otherwise the decree of the Circuit Court in this case was affirmed.

GEORGIA RAILWAY & POWER CO. v. R. R. COMMISSION OF GEORGIA

(U. S. Supreme Court, June 11, 1923)
(262 U. S. 625)

Record: Appeal from a decree of the District Court for the Northern District of Georgia, denying an injunction to restrain the enforcement of an order prescribing a rate for gas supply which was alleged to be confiscatory (278 Fed. 242). Affirmed.

Facts: From the point of view of taxation the facts are not important, except that the complainants paid $45,364 Federal corporate income tax, which they claimed should be deducted in estimating the probable net income.

Question: Was the Federal income tax a proper operating charge?

Decision: "The court disallowed it (the tax) and thus increased its estimate of probable net income. In this the court erred. Galveston Electric Co. v. Galveston," 258 U. S. 388 (ante 897).

GIRARD TRUST COMPANY et al. v. UNITED STATES

(U. S. Court of Claims, May 19, 1924)
(Net yet reported)

Record: Section 1324 (a), Act of 1921. Suit for additional interest on certain refunds. Judgment for defendant.

Facts: The claimants brought this action as trustees of the estate of Alfred F. Moore, deceased. They submitted a return and paid an excess profits tax for the year 1917. They also submitted a return and paid a part of the income tax for 1920. Upon their claims for refund and abatement, the unpaid portion of the tax for 1920 was abated and certain refunds were made, including certain interest. Three of the items for which the suit was brought were for additional interest up to the time the refunds were made.

Question: As the payments of principal and interest had been accepted, could claimants recover further interest?

Decision: "The plaintiffs claim they are entitled to more interest. The principal sums and interest as allowed by the commissioner having been paid to and accepted by the plaintiffs, they cannot maintain in this court an action against the government for additional interest. See Stewart v. Barnes, 153 U. S. 456, 464 [ante 490]."

GRAHAM, COLLECTOR v. DUPONT

(U. S. Supreme Court, May 21, 1923)
(262 U. S. 234)

Record: Section 252, Revenue Acts of 1918 and 1921, and Sections 3224 and 3226, Revised Statutes, and amendments. Certiorari to review the action of the Circuit Court of Appeals (284 Fed. 1017), which affirmed the decision of District Court (283 Fed. 300, ante 882) in granting temporary injunction against collector's levying distraint on account of income taxes. Reversed.

Facts: In a reorganization of Dupont Powder Company of New Jersey, and organization of Dupont Powder Company of Delaware, complainant received stock in the latter company at the rate of two shares for each share he held in the former company. Complainant was notified of an additional assessment made over three years (the period of limitation) after the return was filed. He made claim for abatement of the tax. Thereafter, a stockholder, Phellis, by agreement with the other stockholders similarly situated, paid the tax and brought suit to recover it back. On appeal, the Supreme Court held the distribution of stock taxable. This decision (in United States v. Phellis, 257 U. S. 156; ante 994) was over five years after the return was filed. All claims for abatement, by agreement, had been held for this decision.

Question: Under the facts stated, may a taxpayer sue to enjoin the collection of the tax because not given the right to pay the tax and sue to recover it back, or if he has such rights, may he, in such a suit for the recovery of the payment, raise questions as to the value of the stock and the amount of the tax and also the bar of time as to the assessment?

Decision: The court referred to the provisions of paragraph 3224, Revised Statutes, and said that it declares that the Government's officers "shall not be enjoined from collecting a tax claimed to have been unjustly assessed when those officers, in the course of general jurisdiction over the subject matter in question, have made the assessment and claim that it is valid. * * * Certainly, complainant could not, by delaying his payment until

his right to sue to recover it back expired, make a case so extraordinary and entirely exceptional as to render Section 3224, Revised Statutes, inapplicable." An attack upon the validity of a tax can be heard and considered only after the tax has been paid, in a suit to recover, notwithstanding the contention that the assessment of the tax and the threatened distraint to collect it were barred by limitations. The cases where injunctions were granted involved the recovery of penalties and not taxes simply. "It is certain that by the amendments to Section 252 and Section 3226, Revised Statutes, by the Act of March 4, 1923 (Public No. 527), the complainant is given the right now to pay the tax, and sue to recover it back, and in such a suit to raise the questions as to the value of the stock and the amount of the resulting tax and also as to the bar of time against the assessment which he attempted to raise in the bill."

"The decree of the Circuit Court of Appeals is reversed * * *."

GRAHAM v. MILES, COLLECTOR

(U. S. District Court, D. Maryland, November 21, 1922)
(284 Fed. 878)

Record: Revenue Act of 1918. Suit to recover income taxes for the years 1919 and 1920 paid under protest. Demurrer to the plaintiff's declaration overruled. (Pending in Supreme Court.)

Facts: Plaintiff was appointed a judge of the Court of Claims about September 1, 1919. The collector assessed income taxes against his salary as judge for the years 1919 and 1920. The Revenue Act of 1918 undertook to tax the salaries of all Federal judges. The Income Tax Act of 1918 was approved February 24, 1919, prior to the appointment of the plaintiff as a judge.

Question: Was the plaintiff liable for income taxes on his salary as a Federal judge under the Revenue Act of 1918?

Decision: The court decided that when the Supreme Court in Evans v. Gore, 253 U. S. 245 (ante 203), held the clause taxing Federal judges invalid it took the same out of the Act, and that a

clause cannot be inserted by the court which would tax only judges receiving their appointment after the Act became effective.

"Unless the salary of a judge would have been taxable before the Sixteenth Amendment, it may not be taxed now; for that amendment does not subject to taxation anything which could not before have been taxed, but merely exempts a tax upon incomes from a previously existing requirement of apportionment among the states."

GREENBRIER DISTILLERY CO. v. UNITED STATES et al.

(U. S. District Court, W. D. Kentucky, April 11, 1923)
(288 Fed. 893)

Record: Revenue Act of 1918. Action at law to recover taxes paid. Demurrer of defendant sustained.

Facts: Certain distilled spirits were on the floor of the plaintiff's warehouse up until 2 o'clock in the afternoon of February 25, 1919. The Revenue Act of 1918 was passed on February 24, 1919, and approved at 6:55 p. m. The Act provided that it should take effect on the day following its passage. About 2 o'clock p. m. of February 25th, the spirits were removed by the plaintiff, or were permitted to be removed by certain purchasers thereof, who, before the approval of the Revenue Act, had paid all taxes due the United States up until that time.

Question: Was the plaintiff liable for a tax on such spirits which had been sold but not removed from the floor of the plaintiff's warehouse prior to February 25th, or should tax have been paid by the purchasers?

Decision: "In this situation, under the law, the Government had the right to look to the owner and operator of the bonded warehouse for its taxes, without regard to the rights or equities of other persons—those rights and those equities between the plaintiffs and other persons being adjustable by themselves. * * * We have concluded that the United States had the right under the law to collect all of the taxes involved in this litigation from the plaintiff, in whose warehouse they were at the time those taxes were imposed by law which became effective early on Feb-

ruary 25, 1919, and which thus brought within its provisions all distilled spirits then in bonded warehouses.''

GREENPORT BASIN & CONSTRUCTION CO. v. UNITED STATES

(U. S. Supreme Court, January 2, 1923)
(260 U. S. 512)

Record: Act of 1917. Appeal from the District Court of the United States for the Eastern District of New York, which had entered judgment for the defendant in a suit for the recovery of taxes (269 Fed. 58, ante 242). Affirmed.

Facts: Plaintiff paid excess profits tax of over $12,000 under protest and brought suit for an alleged overpayment of $4,420.40, claiming error of the Government in following Treasury Regulations No. 41, Article 16 and 17, and Form 1103.

Question: Is the Government's method correct of first apportioning the net income into the tax brackets, and then applying the deduction to the first tax bracket, any excess being applied to the next higher tax brackets, or should the deduction be first applied and then the remainder of the net income apportioned in the several tax brackets?

Decision: ''The method of calculation adopted by the Treasury follows the clear language of the Act, and its correctness is confirmed by the statement, and the illustrative tables, presented by the chairman of the Ways and Means Committee in submitting the Conference Reports on the bill.''

GUARANTEE TITLE & TRUST CO v. TITLE GUARANTY & SURETY CO.

(U. S. Supreme Court, April 1, 1912)
(224 U. S. 152)

Record: Bankruptcy Act of 1898. Claim of priority of surety company against a bankrupt estate for having paid a judgment, as surety, against the bankrupt for an ordinary debt. Denied by referee and District Court but allowed by the Circuit Court of Appeals (174 Fed. 385). Decision of the latter court reversed, priority being denied.

Facts: The surety company, as surety, paid a judgment for a claim of the United States against the bankrupt for whom the trust company was trustee. It then petitioned the Bankruptcy Court for an order directing the trustee to pay it the amount of the judgment before making any other distribution of the funds of the bankrupt. The referee decided against this claimed priority, and also decided that this claim had not been presented in time for allowance. This was affirmed by the District Court. The Court of Appeals reversed this decision, awarding priority.

Questions: (1) Was the surety company subrogated to whatever priority the United States had?

(2) Are claims of the United States other than for taxes entitled to be paid before claims for wages earned within three months?

Decision: (1) "The United States is not a party to the action, but appellee brings itself into relation with them as subrogated to their rights by the payment of **a judgment obtained** against it as surety on a bond for the bankrupt. We shall assume that appellee may assert whatever priority the United States possessed."

(2) Before the enactment of the bankruptcy act of 1898, all debts owing to the United States by express statutory provision, were to be paid ahead of labor claims but "A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality.' These were civil obligations, not personal conventions, and preference was given to them; but as to debts, we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily

depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

HAFFIN v. MASON

(U. S. Supreme Court, December, 1872)
(15 Wall. 671)

Record: Act of June 30, 1864. Trespass against collector for wrongfully distraining property. Judgment for defendant affirmed.

Facts: The Commissioner of Internal Revenue, believing that plaintiff had made a false return, directed defendant to demand an additional tax. This, plaintiff refused to pay and defendant distrained upon the property.

Questions: (1) Is a collector who distrains property for taxes when authorized, liable when the assessment was illegal?

(2) Does the assessment list constitute sufficient authority?

Decision: (1) Collector is not liable. "A ministerial officer, in a case in which it is his duty to act, cannot on any principle of law be made a trespasser," citing Erskine v. Hohnbach, 14 Wall. 613 (ante).

(2) "The assessment duly certified to him is his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject matter, constitutes his protection. * * * The list, * * * properly certified, was his warrant to seize and sell the property in case the taxes were not paid after he made demand for them."

HAMILTON, COLLECTOR, v. KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY

(U. S. Circuit Court of Appeals, Sixth Cir., May 8, 1923)
(289 Fed. 20)

Record: Revenue Acts of 1913, 1916 and 1917. Suit to recover income taxes paid under protest. Judgment of the District Court for the plaintiff reversed.

Facts: During the years 1915, 1916 and 1917 the Terminal Company owned and operated a bridge across the Ohio River. The Terminal Company was organized with a capital stock of $75,000, held in equal proportions by three railroad companies, which acquired the terminal properties for the equal benefit of the three companies and not for the purpose of making any pecuniary profit. The Terminal Company had an outstanding mortgage bond issue of more than $6,000,000, the payment of both principal and interest being guaranteed by the three railroad companies. Each railroad was to pay the same amount for switching per car, but any deficit of the Terminal Company was to be made up by the three railroad companies in proportion to each company's use of the terminal, the Terminal Company being required to render monthly bills to the railroad companies for switching charges and for use of the property and facilities of the Terminal Company, to meet all expenses of operation and maintenance of its property, including taxes and interest upon its mortgage bonds. It was provided that no dividend from profits should be declared by the Terminal Company, but that "all surplus and net earnings and income shall constitute a reserve fund for additions to and improvements and reconstruction of the property of the Terminal Company."

Question: Did the contributions by the railroad companies constitute income of the Terminal Company? Was the payment of the bond interest by the proprietary companies to the Terminal Company income of the Terminal Company?

Decision: "The payments made by the proprietary companies were part of the rentals to be paid by those companies for the use of the terminal facilities * * *. They found it to their interest as stockholders to own equal interests in the stock, but as proprietary companies they saw fit to contract to pay to the Terminal Company, which owned and operated the physical properties, whatever amount was required above receipts from other sources to meet the expenses of operation, repairs, maintenance and conservation of property, including interest upon corporate indebtedness. These contributions were apportioned according to the beneficial use of the terminal facilities which each of the

three proprietary companies enjoyed. These payments were nothing more or less than the rentals of the terminal facilities. It could not well be doubted that had they been beforehand fixed in amount they would properly be treated as income. That these amounts were uncertain until fixed by experience does not alter their essential nature."

"Nor, in our opinion, can it properly be said that the corporation was not organized for profit. The contract provision that until otherwise expressly agreed by the proprietary companies no dividend upon profits should be declared, etc., does not preclude a change of policy in that regard * * * . The contemplated 'reserve fund' to result from 'surplus and net earnings and income' could be nothing else than profits. The fact that a net income, in a taxable sense, resulted only because the Terminal Company could not deduct from the rentals received all the interest paid is unimportant * * *. That statutory 'net income' was directly and indirectly due to the interest payments made by the proprietary companies is not important."

HAMPTON & LANGLEY FIELD RY. CO. v. NOEL, COLLECTOR

(U. S. District Court, E. D. Virginia, June 13, 1924)
(300 Fed. 438)

Record: Sections 214 (a) (9) and 234 (a) (8), Act of 1918. Suit to recover income and excess profits taxes paid. Judgment for defendant.

Facts: The taxes were for the year 1918. Plaintiff, a Virginia corporation, built about three and one-quarter miles of railway, connecting Hampton, the C. & O. Railway and the government tracks at the Langley Field Aviation Station, which belonged to the United States. At first, plaintiff rented rolling stock but later it was found necessary to purchase two electric passenger cars and one electric locomotive, paying therefor in the aggregate $34,400. The passenger cars transported passengers from Hampton to Langley Field and the locomotive drew freight cars from the C. & O. Railway to the governments tracks at Langley Field. In its income return for 1918, plaintiff deducted $6,000 for amortization of war facilities under section 214 (a) (9) of the Revenue Act of 1918, claimed on account of

the locomotive and cars. The claim was disallowed and after a claim for refund, this suit was brought.

Question: Was a deduction for amortization of war facilities allowable in this case?

Decision: The court quoted section 234 (a) (8) and the part of the report of the Senate Committee regarding the inclusion therein of the provision as to amortization allowance in the case of vessels constructed or acquired for transportation in the prosecution of the war. The railway cars and locomotives were said to be "equipment." They were acquired after April 6, 1917, and their use was in the transportation of freight and passengers to and from the government aviation field.

"It becomes necessary, therefore, to determine whether it was equipment 'for the production of articles contributing to the prosecution of the present war,' and it is obvious that, if this be true, nearly every railroad company in the United States, which, by reason of the unusual burdens on commerce incident to the carrying on of the war, had acquired extra equipment after the sixth of April, 1917, would come within its time."

The statute requires "that the person claiming the exemption shall have produced articles contributing to the prosecution of the war. Suppose it be admitted that the railway did 'produce' transportation, rather than furnish it, it is still difficult, if not impossible, to regard the word 'articles' as synonymous with 'transportation'. * * *

"Congress, in the applicable provision of the act in question, doubtless had in mind to make provision for those cases of enlargement, at war prices, of plants scattered from one end of the country to the other engaged in the production of war material and equipment of one kind and another."

The claim was denied.

HARDER v. IRWIN, COLLECTOR

(U. S. District Court, N. D. New York, January 2, 1923)
(285 Fed. 402)

Record: Section 31 (b) of the Revenue Act of 1916, as amended by the Act of 1917. Action to recover taxes paid. Complaint dismissed.

Facts: Plaintiff received in December, 1917, $240,000 dividends from the High Rock Knitting Company. The resolution of the Board of Directors provided for the following dividends: 20 per cent from cash surplus accumulated during 1916; 60 per cent from cash surplus accumulated during 1915; 120 per cent from cash surplus accumulated prior to December 31, 1913. The net income of the corporation for 1917, after allowance for income taxes, was $424,958.53. The Department, in auditing the plaintiff's return, made the claim that the first $400,000 of the $700,000 distributed must be taken out of the earnings for 1917 and taxable to the stockholders at the rate in force for that year. Plaintiff paid the additional assessment under protest.

Questions: (1) Does the word "deemed" in Section 31 (b) of the Revenue Act of 1916 as amended by the Act of 1917, mean a conclusive presumption that a distribution made in the year 1917 is made from the most recently accumulated undivided profits or surplus, or merely a rebuttable presumption?

(2) Assuming that the word "deemed" is a conclusive presumption, must corporate profits earned in the year 1917 be included in the corporation's "most recently accumulated undivided profits or surplus" within the meaning of Section 31 (b)?

Decision: (1) "The statute means that, regardless of the form of the declaration, it is conclusively presumed that the distribution is out of the most recently accumulated undivided profits or surplus."

(2) "The plaintiff relies upon the definition given the words 'accumulated undivided profits or surplus' by works on accounting. While it is undoubtedly true these works are recognized as authorities by bookkeepers and accountants, and might have been known by some members of Congress when the legislation in question was enacted, nevertheless, it is apparent that this statute was prepared for the general public and the ordinary interpretation of the words must be taken rather than any technical limitation which may be placed upon them by experts. * * *

In common phraseology, 'surplus' is that which remains when use or need is satisfied; it is the excess or overplus. * * * 'Profits' has ordinarily been designated as the gain made in any business or investment. * * * It cannot under a fair construction of the statute be denied that the earnings and profits for the year 1917 were undivided profits, nor can it be disputed that they were the most recently accumulated earnings and profits which had accrued since March 1, 1913.''

HARDING v. WOODCOCK, COLLECTOR

(U. S. Supreme Court, November 3, 1890)
(137 U. S. 43)

Record: Action against the collector for an alleged wrongful seizure and sale of property of the plaintiff upon an assessment against him as a distiller of liquors. Judgment of Circuit Court in favor of the defendant affirmed.

Facts: An assessment was made against the plaintiff in 1881 for taxes alleged to be due for whisky produced by him. The collector distrained and sold certain of his property. Prior to this sale, the Government brought suit against the plaintiff and his bondsmen for the taxes. In 1883 a verdict was rendered in favor of the defendant. This suit was brought against the collector for damages claimed from the illegal sale of the taxpayer's property.

Question: Was the collector liable for damages where distraint proceedings followed an assessment by the Commissioner?

Decision: ''When the assessment was certified to the collector, his duty in enforcing it was one which he could not refuse to perform. There was no discretion vested in him to revise or alter it in any respect.'' The court further held that there was no obligation on the part of the collector to hold up distraint proceedings pending the determination of the suit brought by the Government to collect the tax.

HARTRANFT v. WIEGMANN
HARTRANFT v. WINTERS

(U. S. Supreme Court, May 2, 1887)
(121 U. S. 609, 616)

Record: Actions to recover duties alleged to have been illegally exacted. Judgments of the Circuit Court for plaintiffs affirmed.

Facts: Plaintiffs imported into the United States a quantity of shells. They had been cleaned by acid and ground on an emery wheel to expose the pearly interior.

Question: Were such shells liable to duty as "manufactures of shells"?

Decision: The court held that the shells were not manufactured. "They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in tariff laws."

HAVERTY FURNITURE CO. v. UNITED STATES

(U. S. District Court, N. D. Georgia, August 18, 1922)
(286 Fed. 985)

Record: Stamp taxes on promissory notes, Revenue Act of 1918. Action by company to recover stamp taxes paid. Judgment for plaintiff.

Facts: The instruments required to be stamped as promissory notes were contracts witnessing a purchase and concluding "this writing is the whole contract and no verbal statements or representations are binding." They describe the furniture bought, the terms of sale, the price and time of payment, provide for retention of title, give an option to the seller to rescind on certain defaults and to appropriate payments already made to rent, etc. Some in stating the price, have the words, "for which I agree to pay [so much];" others simply say "for [so much]."

Question: Were these instruments subject to the stamp tax, as promissory notes?

Decision: "The suggestion that the form of contract, with the alteration of it, is an effort to evade the tax, may be laid aside. * * * By 'promissory notes' used in connection with drafts and checks, was intended commercial paper which generally throughout the United States would be so called and recognized. * * * A suit for the purchase money could not be maintained by merely putting in evidence such a paper. It would have to be supplemented by proof that the seller had on his part delivered the furniture, or tendered delivery. * * * The meaning is that the buyer agrees to pay on the seller's delivering the furniture. The writings are memoranda of sale, which would satisfy the statute of frauds in proving the contract; but they are not promissory notes within the meaning of this statute."

HEAD MONEY CASES

EDYE et al. v. ROBERTSON, COLLECTOR

CUNARD STEAMSHIP CO. v. ROBERTSON, COLLECTOR

(U. S. Supreme Court, December 8, 1884)
(112 U. S. 580)

Record: Act of August 3, 1882. Suits to recover of collector money paid under protest as duties on immigrants. Judgment for collector (18 Fed. 135 and 147). Cases reviewed by the Supreme Court on writ of error. Judgments affirmed.

Facts: The plaintiff in each case had paid the collector on demand and under protest a duty of 50 cents for each immigrant brought to the port of New York.

Questions: (1) Is the act unconstitutional in that the tax levied does not provide for the common defense and general welfare of the United States?

(2) Does the tax violate the constitution as to the rule of uniformity?

Decision: (1) The court held that it was not necessary to prove that the duty was levied for the general welfare of the United States, apparently, because so obvious.

(2) "The uniformity here prescribed (Section 8 of Article 1 of the constitution) has reference to the various localities in which the tax is intended to operate. 'It shall be uniform throughout the United States.' Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it? The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. * * *"

The court said that the decisive answer to these objections was that the tax was not the result of the taxing power but was the mere incident of the regulation of foreign commerce.

HECHT v. MALLEY, COLLECTOR
HOWARD v. MALLEY, COLLECTOR
HOWARD v. CASEY, COLLECTOR
CROCKER v. MALLEY, COLLECTOR

(U. S. Supreme Court, May 12, 1924)

(265 U. S. 144)

Record: Capital stock tax under the Revenue Acts of 1916 and 1918. Suits for recovery of the tax. Judgments for plaintiffs (276 Fed. 830) were reversed by the Court of Appeals (281 Fed. 363, ante 928). The Supreme Court reversed the decision of the Court of Appeals in part and affirmed it in part.

Facts: These four cases were suits brought to recover capital stock tax paid under protest under the Acts of 1916 and 1918, plaintiffs claiming they were not such associations as were subject to the excise tax based upon the value of their capital stock. The case involved the "Hecht Real Estate Trust," the "Haymarket Trust" and the "Crocker, Burbank & Co. Ass'n." Under the Massachusetts decisions the trust instruments are held to create either pure trusts (if the trustees are principals and free from control of the certificate holders) or partnerships (if the

certificate holders are associated together in control of the property as principals, the trustees being simply their agents). These trusts are not formed under any statute, and derive no power, benefit or privilege from any statute. The State, however, recognizes them as "associations" and imposes upon them certain liabilities.

Questions: (1) Was the excise tax properly assessed as to the capital of the trusts under the law of 1916?

(2) Was the excise tax properly assessed as to the capital of the trusts under the law of 1918?

(3) Were these three trusts associations created or organized in the United States and engaged in business, within the meaning of the Act of 1918?

(4) Did the Crocker, Burbank & Co. Ass'n have a capital stock, within the meaning of the taxing act?

(5) As this tax could not properly be assessed under the Act of 1916, could the Government retain taxes assessed and paid thereunder for the year ending June 30, 1919, because of the retroactive features of the Revenue Act of 1918?

Decision: (1) As to the Revenue Act of 1916, the bill as introduced, provided for an income tax upon every corporation, joint-stock company or association "organized in the United States, no matter how created or organized," and contained no provision for an excise tax. The Senate amended it so as to impose a capital stock tax on corporations, etc., as defined in the income tax part of the act. The House, however, did not agree to this amendment, and there was inserted in the bill in lieu of the Senate amendment the provision for the excise tax in the Act as passed in which the words "no matter how created or organized" were omitted, and the words "organized under the laws of the United States, or any State or Territory," which had been contained in the Act of 1909, were inserted. "It thus appears that Congress intended to make a clear distinction between the provisions relating to the income tax and to the excise tax, and purposely framed them, as shown by the amendment incorporated in the bill before its final passage, so that while the

income tax provision should apply to all domestic corporations, joint-stock companies or associations, no matter how created or organized, the excise tax provision should only apply to such as were organized under statutory law. * * *

"* * * And since these limiting words, when used in the Act of 1909, had been held by this Court * * * to show the intention of Congress to embrace within the statute only such corporations and joint-stock associations as 'are organized under some statute, or derive from that source some quality or benefit not existing at the common law,' they must be given the same meaning and effect when used in the Act of 1916. In adopting the language used in an earlier act Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment. * * * And here the legislative history of the excise tax provision of the Act of 1916, and the marked contrast between its language and that of the income tax provision of the same Act, plainly show, aside from this rule of statutory construction, that this is what Congress in fact intended. We conclude that as the trusts involved in these four cases are not organized under any statute and derive from such source no quality or benefit, they are not within the terms of the excise tax provision of the Act of 1916."

(2) The Revenue Act of 1918 provided that the term "corporation" should include associations, and that the term "domestic" when applied to a corporation or partnership should mean "created or organized in the United States," the term "foreign" meaning "created or organized outside of the United States." The excise tax was laid on "every domestic corporation" with respect to the carrying on or doing of business in the United States. The excise tax provisions of the Act of 1916 were specifically repealed with certain exceptions. "The terms of this Act [1918] are in marked and significant contrast with those of the Acts of 1909 and 1916. Not only is the Act of 1916 specifically repealed, but the well-defined words of limitation 'organized under the laws of the United States, or any State or Territory,' that had been used in that Act as well as in the Act of 1909, are omitted; and in lieu thereof the excise tax is extended, broadly,

to every 'association' created or organized in the United States and carrying on or doing business therein. And thereby, in our opinion, the intention of Congress is plainly shown to extend the tax from one imposed solely upon organizations exercising statutory privileges, as theretofore, to include also organizations exercising the privilege of doing business as associations at the common law.''

(3) The court held that the trusts were ''associations'' taxable under the Act. ''The word 'association' appears to be used in the Act in its ordinary meaning. It has been defined as a term 'used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise'. * * * Other definitions are: 'In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation.' * * * 'An organized but unchartered body analogous to but distinguished from a corporation.' ''

''We think that the word 'association' as used in the Act clearly includes 'Massachusetts Trusts' such as those herein involved, having quasi-corporate organizations under which they are engaged in carrying on business enterprises. What other form of 'associations', if any, it includes, we need not, and do not determine. * * * And we think that the present trusts are both 'created' and 'organized' in the United States within the meaning of the Act.''

Crocker v. Malley, 249 U. S. 273 (ante 161), ''is not an authority for the broad proposition that under an Act imposing an excise tax upon the privilege of carrying on a business, a Massachusetts Trust engaged in the carrying on of business in a quasi-corporate form, in which the trustees have similar or greater powers than the directors in a corporation, is not an 'association' within the meaning of its provisions.''

''We do not believe that it was intended that organizations of this character—described as 'associations' by the Massachusetts

statutes and subject to duties and liabilities as such—should be exempt from the excise tax on the privilege of carrying on their business merely because such a slight measure of control may be vested in the beneficiaries that they might be deemed strict trusts within the rule established by the Massachusetts courts.''

(4) It was urged by the trustees of the Crocker association that they were not subject to the excise tax under the Act of 1918 because the tax was measured by the value of the capital stock and this association had none. The certificates had no par value, the shares being for 96/1000 of the total beneficial interest in the property. The amount of the tax was assessed by the collector by deducting the liabilities from the fair value of the assets and calling the difference the capital stock. The court said that, generally speaking, the capital stock of a corporation was the sum fixed by its charter, but that ''in statutes relating to taxation, sometimes drawn without regard to the technical meaning of the words, the courts will construe 'capital stock' to mean the actual property of the corporation, when necessary to carry out the intent of the statute. * * * We think that in the Act of 1918, in which the tax upon an association is based upon the average value of its 'capital stock,' including surplus and undivided profits, these words are not to be given a technical meaning, but should be interpreted, in their entirety, and, in the absence of a fixed share capital, as equivalent to the capital invested in the business, that is, the net value of the property owned by the association and used in its business. * * * We, therefore, conclude that the Crocker association was also subject to the tax, and that this was properly measured by the Collector by the net value of its property—no question being made as to the correctness of his valuation.''

(5) ''In view of the retroactive provision of the Act of 1918, we are of opinion that the taxes for the year ending June 30, 1919, cannot now be recovered, even though originally their assessment under the Act of 1916 was unauthorized, since they thereafter became due under the Act of 1918; and that they may now be retained by the United States.''

HENRY et al. v. LEDERER, COLLECTOR

(U. S. District Court, E. D. Pennsylvania, January 19, 1923)
(285 Fed. 659)

Record: Revenue Act of 1918. Suit by executors for return of taxes paid. Demurrer overruled.

Facts: An estate tax was collected on the estate of Adeline Pepper Gibson. On March 29, 1918, she was appointed "stenographer in the United States Army, Medical Department at Large, at a salary of $720 per annum, with rations and lodging." She took the oath of office and signed the muster roll to serve for two years or the duration of the war and entered upon the duties of her appointment, serving at various hospitals in the United States. Being ordered overseas, she reported for duty at Nantes, France, where she remained on duty until December 18, 1918, when she was ordered to the hospital, where she died January 10, 1919, in line of duty.

Plaintiffs filed an estate tax return and a claim for exemption under Section 401 of the Revenue Act of 1918. This claim being rejected, the tax was paid under protest, and a subsequent claim for refund having been denied, this suit was brought. An affidavit of defense was filed, amounting to a demurrer.

Question: Were the allegations sufficient to establish exemption as one serving in the military or naval forces of the United States?

Decision: "The term 'military or naval forces of the United States' by the provisions of section 1, supra, includes certain enumerated units, but is not to be deemed to exclude other units otherwise included within such term. The force with which the decedent was connected was the United States Army, Medical Department at Large, which would presumably include units not excluded from the term 'military forces' in section 401, so far as her status is concerned. * * *

"The facts set forth in the statement of claim, if proved by evidence produced at the trial, may well be found to justify the claim that Miss Gibson was serving *in* the military forces of the United States.

"There is no apparent ground for holding that Congress intended to exclude the estates of noncombatants from exemption. The contrary intention may be justified, and the law as applied to this case may best be determined when the court has before it all the evidential facts. It is my opinion, therefore, that the statement of claim is sufficient, and the question whether Miss Gibson died while actually serving in the military forces of the United States is a trial question, and cannot be determined against the plaintiffs as a matter of law from the allegations in the statement of claim."

HERNANDEZ v. McGHEE

(U. S. Circuit Court of Appeals, Eighth Cir., December 3, 1923)
(294 Fed. 460)

Record: Revenue Act of 1913. Section 3224, R. S. Suit to enjoin collection of tax. Injunction granted upon bond being filed. Reversed on appeal.

Facts: Plaintiff was a member of a partnership owning an oil lease. In August, 1913, his interest and other interests therein were transferred to a corporation, the stock of the corporation being issued to them in payment. No return was made. In 1921 the Collector made a return for petitioner and demanded payment of the tax. Suit was brought for this tax and for a penalty. Later a threat of distraint was made. Plaintiff claimed that no tax was due as there had been no change in the value between March 1, 1913, and the time of sale; that no demand had been made upon him for a return and the fixing of the values was without consultation with him; that the property was being worked and developed, and if the development were not completed the claims secured under certain locations named would become worthless; that the seizure of the property threatened with distraint would cause the work to be stopped; and that the stocks of explosives on hand would deteriorate and become a total loss unless used promptly. He asked an injunction against the Collector attempting to enforce his demand. The trial court ordered the injunction contingent upon plaintiff filing a $5,500 bond to cover any damages to be sustained by defendant. An appeal was taken from this decree.

Question: Under the facts stated, may a suit be brought to enjoin the collection of the tax?

Decision: The decision in Graham v. Dupont, 262 U. S. 234 (ante), was held to be controlling in favor of the Collector, and the case was held not to fall within the doctrine of Hill v. Wallace, 257 U. S. 310 (see ante 905), or Lipke v. Lederer, 259 U. S. 557 (ante 924). The decree was reversed.

HEROLD, COLLECTOR, v. SHANLEY

(U. S. Circuit Court of Appeals Third Cir., May 2, 1906)
(146 Fed. 20)

Record: Act of June 13, 1898, and amendatory acts. Suit for the recovery of an inheritance tax paid. Judgment for plaintiff. Writ of error. Affirmed.

Facts: Bernard M. Shanley died March 19, 1900. His will was probated the following month. In 1901 and 1902, the executor was obliged to pay over $100,000 as an inheritance tax and interest. The will constituted a trust fund, the income to be used for the education of a grandson until he became 21, when the principal was to be paid to him. A further trust fund was provided in case of the death of the widow, in certain contingencies, the income and principal to be paid as in the case of other trust fund. If the grandson were to die before becoming 21, the legacies to him were to lapse.

The Seventh clause directed that the income of the residue should be annually divided between the widow and the three sons until the death or remarriage of the widow. Upon the happening of either event, her interest in the estate was to cease and the principal was to be divided between the sons.

Questions: (1) Were the legacies to the grandson contingent?

(2) Were the legacies to the sons given in the seventh clause of the will taxable?

(3) Should interest be added if there were a recovery?

Decision: (1) As to this point the court held decisive the decision in Gifford v. Thorne, 9 N. J. Eq. 702, that a legacy to a

person "when he arrives at the age of 21 years" is a contingent legacy. "And this court has recently decided, in Philadelphia Trust, etc., Co. v. McCoach, 129 Fed. 906 * * * that a legacy to a daughter, which she was not to take unless she survived her mother was contingent and not vested."

(2) The second question was said to require no elaborate discussion in view of the decision in Vanderbilt v. Eidman, 196 U. S. 480 (post). It was held that the interests of Bernard M. Shanley's sons under the seventh clause of his will were not taxable. Besides, one of the contingencies contemplated by the will was the remarriage of the widow, and there is no way of even conjecturing as to the probability of that.

(3) "That interest was properly allowed upon the principal of the tax, since payment had been illegally exacted from the defendant in error, we have no doubt."

HERTZ, COLLECTOR, v. WOODMAN et al.

(U. S. Supreme Court, May 31, 1910)
(218 U. S. 205)

Record: Sections 29 and 30 of the Act of June 13, 1898, and the Act of April 12, 1902. On a certificate from the Circuit Court of Appeals, presenting the question whether a legacy is exempt from the Federal inheritance tax, where the testator died less than one year prior to the date when the repealing act took effect. Answered in the negative.

Facts: The action in the Circuit Court was one by the executors and legatees under the will of James F. Woodman to recover a tax on legacies which had been paid. Woodman died March 15, 1902. The clear value of the legacies was $166,250. On January 17, 1905, and before the payment of these legacies, a tax of $2,812.49 was collected.

Question: Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902, relieve from taxation legacies otherwise taxable under sections 29 and 30 of the Act of June 13, 1898, as amended by the Act of March 2, 1901?

Decision: The Act of April 12, 1902, effective July 1, 1902, repealed section 29 of the Act of June 13, 1898, which was the section imposing the tax. The Government contended that as the testator's death occurred prior to July 1, 1902, the tax had been imposed as an obligation and that the liability therefor remained under the saving cause of the repealing act, which covered all taxes "imposed" by said section 29 "prior to the taking effect of this act." The court said the answer to the question depended upon whether the tax had been "imposed" prior to July 1, 1902, and that if, prior to the repealing act, there was an obligation to pay the tax such obligation was not relieved by the repeal.

"Any legacy or distributive share, or gift in anticipation of death, 'passing after the passage of the act' is, by the express terms of that section, 'made subject to a duty or tax to be paid to the United States, as follows,' etc."

The court said that it had been conclusively decided in Vanderbilt v. Eidman, 196 U. S. 480 (post) "that the tax or duty does not attach to legacies or distributive shares until the right of succession becomes an absolute right of immediate possession or enjoyment. It was therefore held in the case cited that a legacy upon conditions which might never happen was not subject to the tax or duty prior to the time, if ever, when the right of possession or enjoyment should become absolute. * * *

"Upon the facts certified, the right of succession which passed by the death of the testator was an absolute right to the immediate possession and enjoyment, a right neither postponed until the falling in of a life estate, * * * nor subject to contingencies, as in Vanderbilt v. Eidman, supra. No further event could make their title more certain nor their possession and enjoyment more secure. The law, then unrepealed and in full force, operated to fasten, at the moment this right of succession passed by death, a liability for the tax imposed upon the passing of every such inheritance or right of succession. The time for scheduling or listing was practically identical with the time for payment, and the listing or scheduling was required to be done by the executor charged with payment, but might be and was post-

poned for reasons of grace and of convenience. * * * The liability attaches at some time before the time for payment. But the liability * * * accrued or arose the moment the right of succession by death passed to the defendants in error, * * *'' The argument that the liability did not attach because the tax was not due and payable was considered without weight.

''The conclusion we reach is, that upon the passing by death of a vested right to the immediate possession or enjoyment of a legacy or distributive share there was imposed the tax or duty exacted upon every such right of succession, which was saved by the saving clause of the repealing act.''

HEYMAN et al. v. UNITED STATES
IN RE R. M. ROSE CO.

(U. S. Circuit Court of Appeals, Sixth Cir., January 15, 1923)
(285 Fed. 685)

Record: Section 303, Act of 1917. Appeal from District Court which had held plaintiffs liable to the tax. Affirmed.

Facts: A wholesale and retail liquor dealer was adjudged bankrupt. There was on hand a large stock of liquor. The trustees applied for and received authority from the referee to dispose of the stock at retail. The trustees so sold the liquor largely by the quart or less, selling directly to the consumers for a price equivalent to the price with the tax added, but not designating part of the price as being for the tax. Thereafter, the Government intervened in the bankruptcy, claiming the tax from the trustees. The trustees interpreted the statute as meaning that all whisky sold by them in quantities of less than fifty gallons was exempt. The Bureau of Internal Revenue construed it to exempt only sales to retail liquor dealers to the extent to which they were not already in possession of fifty gallons upon which the tax had not been paid. The Government advanced the interpretation that the exemption applied to any vendor, and that fifty gallons only might be sold without payment of the tax, no matter to whom or in what quantity.

Questions: (1) What is the proper construction of section 303 as to the exemption of the fifty gallons of distilled spirits in

the custody of the Court of Bankruptcy June 1, 1917, when sold at retail by the trustees in bankruptcy?

(2) Are such trustees accountable to the Government for the tax when they have sold the liquor at retail free of the tax but for a sum equivalent to the price and the tax?

Decision: (1) "The purpose of the proviso was merely to obviate the necessity of the immediate payment of the floor tax by the trustee (who would not be likely to have funds so to do), to postpone it until the date of the sale of the liquor, and to require it then to be paid by the purchaser. So far as the amount of the exemption was concerned, the trustee was put upon the same footing as other dealers, retail or wholesale, respectively. The words of the proviso, 'the amount thus delivered,' mean the total amount delivered by the trustee to all purchasers. In short, the proviso goes to date of payment, not to exemption. Therefore, it is held that the third interpretation above set forth is the correct one. It follows that the trustees in this case were entitled to a fifty gallon exemption, and no more, and that all of the remainder of the liquor in controversy was subject to tax, and should have been so sold."

(2) The trustees should have delivered no whisky except the exempt fifty gallons, unless the tax was contemporaneously paid and should have so informed the purchasers. The latter paid amounts equivalent to what they would have paid if the sales had been properly made, and this fund is now in court for distribution to those to whom it justly belongs, and in ordering so much thereof as represents the tax to be paid to the Government the lower court acted correctly.

HILL et al. v. GRISSOM, COLLECTOR

(U. S. District Court, E. D. North Carolina, May 10, 1924)
(299 Fed. 641)

Record: Section 403, Revenue Act of 1918. Suit to recover tax paid. Demurrer to complaint sustained.

Facts: Watts died March 7, 1921. The estate tax was assessed against his estate and was paid. The state tax assessed

against the personal property of deceased in the possession of plaintiffs for year 1921 was paid November 28, 1921. As required by the State law said personal property was listed for taxation on May 1, 1921. Plaintiffs contend that such State tax was an item which should be deducted from the appraised value of the estate before the net value of the same is fixed, or that it was a liability of deceased, or of his estate, or a claim or charge thereon or expense thereof which plaintiffs as executors were required to pay. Claims for abatement and refund having been disallowed, suit was brought. The question was narrowed as stated below.

Question: Are such State taxes a proper deduction as "administration expenses or claims against the estate" in arriving at the net value of the estate?

Decision: The tax is one "imposed upon the transfer of the net estate of every decedent, graduated according to the value, as ascertained by deducting, in the case of a resident, from the value of the estate, fixed at the date of his death, 'funeral expenses, claims against the estate, and administration expenses'."

The state "may fix both the time and principle, or method, by which the tax is to be ascertained. The Act of 1918 does this by directing the executor to make a return of the gross value of his testator's estate to the designated officer, with such information as will enable him to ascertain and fix the net value of the estate as of the date of the death of his testator, and this amount, when ascertained by making the specified deductions, becomes the basis upon which the tax is assessed. From this amount, among other specified items, the executor is directed to deduct 'administration expenses and claims against the estate'."

The State taxes in question are not administration expenses nor deductible claims against the estate which are "such demands or claims of a pecuniary nature which could have been enforced against the decedent during his life."

The court quoted with approval the regulations adopted by the Treasury Department in this particular.

The demurrer was sustained.

HOME SAVINGS BANK v. DES MOINES et al.
PEOPLES SAVINGS BANK v. DES MOINES et al.
DES MOINES SAVINGS BANK v. DES MOINES et al.

(U. S. Supreme Court, April 22, 1907)
(205 U. S. 503)

Record: Writ of error to Iowa Supreme Court to review three judgments (101 N. W. 867) which affirm judgments of the District Court in that State affirming the action of the Board of Review of Des Moines in refusing to deduct from the assessment of the State banks upon their shares of stock the amount of Government bonds owned by them. Reversed and remanded.

Facts: The banks were Iowa corporations. The State law levying the tax provided that " 'shares of stock of State and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies, and not to the individual stockholders.' "

"Each bank owned at the time to which the assessment related United States bonds, the value of which they insisted should be deducted from the valuation of the property assessed to them. The taxing authorities refused to make the deduction, and their action was sustained by the Supreme Court of the State."

Question: Is this State law unconstitutional as imposing a tax upon United States securities?

Decision: "A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies'. But the true interpretation of the law cannot rest upon a single phrase in it."

These shares "are to be 'assessed to such banks * * * and not to the individual stockholders'. When this is read the doubt instantly arises whether the law intended to tax the corporation for property which it does not own, but which, on the contrary, is owned by the stockholders. * * *

"The fair interpretation of the law is that the taxes are upon the property of the banks."

The taxing statute closes with the words " 'and the property of such corporation shall not be otherwise assessed', which plainly implies that the assessment already provided for is, in substance, an assessment upon the property of the corporation. * * * We therefore conclude that the substantial effect of the law is to require taxation upon the property, not including the franchise, of the banks, and that the value of the shares, ascertained in a manner appropriate to determine the value of the assets, is only the standard or measure by which the taxable valuation of that property is determined. * * *

"The State cannot, by any form of taxation, impose any burden upon any part of the national public debt. * * * If included in that property [the property taxed] it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected."

The capital stock owned by the corporations and the shares of stock therein owned by individuals are recognized as distinct properties, and several cases sustaining taxation thereon were given, but the court said there was nothing in those cases "which justifies the tax under consideration here, levied, as has been shown, on the corporate property."

"It is said that where a tax is levied upon a corporation, measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the State has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics."

HUNNEWELL et al. v. GILL, COLLECTOR, et al.

(U. S. District Court, D. Mass., June 5, 1918)
(257 Fed. 857)

Record: Acts of June 13, 1898, April 12, 1902, June 27, 1902, and July 27, 1912, and Revised Statutes Sections 3220, 3226, 3227,

and 3228. Action to recover with interest an inheritance tax paid under protest in 1903. Judgment for defendants.

Facts: The decedent died in May, 1902. The estate was not probated, nor any distribution made before September, 1902. The inheritance tax provisions involved in the case were repealed by the Act of April 12, 1902, the repeal to take effect on July 1, 1902. The Act of June 27, 1902,* provided that no tax should thereafter be assessed under the Act of 1898 "upon or in respect of any contingent beneficial interest which shall not have become absolutely vested in possession or enjoyment prior to July 1, 1902," and that such taxes which had been collected should be refunded.

Questions: (1) Did unprobated estates like this come under the exemption of Act of June 27, 1902?

(2) Did the Act of 1912 open the way for a suit against the collector under the general revenue statutes?

Decision: (1) On the authority of United States v. Jones, 236 U. S. 106, and McCoach v. Pratt, 236 U. S. 562, no tax was assessable under the Act of 1902 on unprobated estates like the present one. Therefore the tax in question here was illegally assessed and collected.

(2) "The question is of practical importance, because, if the plaintiffs can maintain the present action, they would be entitled to interest, which as stated, amounts to $83,000. * * * If they can only sue the United States, as the Act of 1912 does not provide for the payment of interest, it can not be recovered."

" * * * All claims under the Act of 1912 are to be prosecuted in the same manner, i. e., by suit against the United States. * * * [Hvoslef case, 237 U. S. 11]. I do not think that the act contemplates two sorts of claims, one of which may be recovered with interest through suits against the collector, based on the first section and the general revenue statutes (Revised Statutes, Sections 3220, 3226, 3227 and 3228), while the other is to be recovered without interest through suits against the United States, based on the second section."

HYLTON v. UNITED STATES

(U. S. Supreme Court, December, 1796)
(3 Dallas 171)

Record: Act of June 5, 1794. Writ of error to the Circuit Court of the United States for the District of Virginia to review judgment against Hylton in action to collect tax. Affirmed.

Facts: Hylton owned and kept for his own private use 125 chariots at the time the act was passed, and so, under the act was liable to pay the tax, if legally imposed.

Question: Is a tax upon carriages such as imposed by the Act of June 5, 1794, a direct tax and so unconstitutional because not laid according to the rule of apportionment?

Decision: "The power in the eighth section of the first article (of the United States constitution) to lay and collect taxes, included a power to lay direct taxes (whether capitation or any other) and also duties, imposts, and excises, and every species or kind of tax whatsoever and called by any other name. * * *

"The constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule.

"If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the constitution intended such tax to be laid by that rule." The justice showed by illustrations that a tax on carriages can not be laid by the rule of apportionment without great inequality and injustice.

"I think an annual tax on carriages for the conveyance of persons may be considered as within the power granted Congress to lay duties. The term duty is the most comprehensive next to the general term 'tax'; and practically in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.) embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only.

"It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity, and such annual tax on it, is on the expense of the owner."

IN RE A. E. FOUNTAIN, INC.

(U. S. District Court, S. D. New York, February 20, 1924)
(295 Fed. 873)

Record. Section 64, Bankruptcy Act of 1898. The referee's report was modified by the court.

Facts: The referee held that the administration expenses were entitled to priority over taxes; that federal and state taxes should be prorated, neither having priority over the other, and that neither of these taxes was entitled to priority over preferred wage claims.

Question: What are the priorities for payment out of a bankruptcy estate of federal taxes, state taxes, preferred wage claims and costs of administration?

Decision: The court quoted said section 64 and said that it did not require taxes to be paid in any particular order, though the United States was mentioned first.

"As the act carefully provides in subdivision 'b' the order of payment of various items by placing them under separate numerals, it seems reasonable to contend that it would have done this in respect to taxes if Congress had intended any discrimination in priority between taxes due the United States and taxes due the states and political subdivisions thereof. Of course, any tax which is a lien would necessarily precede any other claim whether by virtue of the taxing power or otherwise which was not a prior lien."

The court referred to certain provisions of the New York law as to taxation and said: "Whatever may be the proper construction of this act, the Commissioner of Internal Revenue and the New York state tax commission have approved of sharing pro rata in the fund, where it is not sufficient to pay the taxes

due to both. * * * Each tax * * * is payable with only simple interest.''

The act gives priority to taxes over debts but not as against necessary obligations of the receiver or trustee or expenses of administration.

As there were not sufficient assets after the payment of administration expenses to cover the taxes, the latter were prorated, and nothing was paid on the claims for wages.

IN RE ANDERSON

(U. S. Circuit Court of Appeals, Second Cir., January 18, 1922)
(279 Fed. 525)

Record: Bankruptcy Act, Section 64a. Appeal from order of District Court (275 Fed. 397, ante 837) barring the United States from participating in the bankrupt's estate for income taxes. Affirmed.

Facts: At the time of the bankruptcy, in 1918, the bankrupt had made a return showing an income tax due for 1917 of $650. No proof of claim was filed by the United States. At the close of 1920, the Trustee in Bankruptcy served the Collector with notice returnable January 7, 1921, on a petition praying an order, foreclosing the United States from participating in the bankrupt estate or that the United States be directed to file its claim within a certain time. The United States appeared specially, contesting the jurisdiction of the court and urging that service on the Collector was not service on the United States. These objections were overruled by the referee. Testimony was taken on behalf of the Trustee, and an order was entered barring the United States from participating in the estate. The order was affirmed by the District Court.

Questions: (1) Has the District Court jurisdiction to order that the United States be barred from its claim for taxes unless the claim be filed within a prescribed time?

(2) Was service of notice upon the Collector sufficient as to presenting the government's claim for taxes?

Decision: (1) "The United States must file its claim for taxes as any other creditor, if it desires to share in the estate, and the court must determine any question arising as to the amount or legality of such tax. It cannot stand by, as it did here, after permission having been granted to file its claim, and expect to subsequently collect the tax from the bankrupt or his trustee. To permit such a procedure would make it impossible to say when there could be a winding up of the bankruptcy proceedings and a distribution of the assets. The trustee may only pay out the assets under an order of the referee or the court, and without such order he could not pay the income tax owing to the government. If the government had a priority, it could be easily determined in this proceeding, and it clearly was the intention of Congress that it should be determined under the command of section 64a, where the United States is specifically mentioned. We think it was the intention to have settled promptly in the bankruptcy proceedings all matters of taxes due the United States. The Bankruptcy Act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor."

(2) "We think the trustee properly initiated these proceedings by making the collector of internal revenue a party. * * * Notice of hearing on the petition was given to the collector, so that the United States might have opportunity to establish its claim. The official charged with the duty of collecting taxes is the collector of internal revenue, and it was he who filed a claim. It is he who serves notices upon delinquents and receives all payments under Revised Statutes, pars. 3183, 3184 * * *, and it is he who distrains and sells upon the distress. Section 3187 * * *. All the duties devolving in such proceeding are those of the collector of internal revenue. He is the proper person to be notified to be brought into court on a proceeding such as the one instituted below."

IN RE ARCHER

(U. S. District Court, S. D. New York, 1878)
(Fed. Case 506)

Record: Secs. 3172 to 3182, R. S. Contempt proceedings for disobeying summons to produce all books of account, etc., relating to trade from January, 1866, to January, 1872. Application for attachment denied.

Facts: Archer refused to show his books. He had made sworn returns of his income during the time in question. The fifteen months' statutory period had elapsed.

Questions: (1) Under above sections will attachment lie upon refusal to show books?

(2) Can a new list be made out after the fifteen months' period had elapsed?

Decision: (1) The sections in question are part of a scheme looking solely to the assessment and collection of taxes through the machinery of assessment and collection by the warrant of the collector.

"I do not think it is within the purview of the sections referred to * * * that unpaid income taxes are now to be assessed and collected through the machinery provided by those sections," for the several years in question prior to the suit.

(2) "Under Section 3182 the Commissioner * * * could not now make a new or corrected list in respect to the income taxes of Mr. Archer for the years named in the summons because the fifteen months named in Section 3182 have elapsed."

IN RE ASHLAND EMERY & CORUNDUM CO., BANKRUPT

(U. S. District Court, D. Mass., February 1, 1916)
(229 Fed. 829)

Record: New Jersey statutes requiring interest of 1 per cent a month on tax overdue, and Bankruptcy Act, Section 64a. On review of order of referee disallowing a claim. Order reversed and claim allowed in part.

Facts: A state franchise tax against the bankrupt corporation was paid some time after it was due but the trustee in bankruptcy refused to pay the sum added as interest at 1 per cent a month.

Question: May interest be added at the rate of 1 per cent a month to state taxes not paid when due, ahead of claims entitled to priority in bankruptcy proceedings?

Decision: Under the bankruptcy act, taxes stand ahead of preferred claims. Such interest as will make the payment when received equivalent to the payment of the tax at the appointed time is a part of the tax. Penalties are no part of the tax. As the statute provided 6 per cent interest as the legal rate for individuals, that rate was allowed and the balance of the claim was disallowed.

IN RE BALTIMORE PEARL HOMINY COMPANY

(U. S. District Court, D. Maryland, January 7, 1923)
(294 Fed. 921)

Record: Section 64a, Bankruptcy Act, Section 3466, R. S., and Section 5908, Compiled Statutes. Claims to priority of payment in bankruptcy estate. Claims allowed as unsecured debts.

Facts: On July 10, 1920, the Commissioner sent the company a notice of an additional income and excess profits tax, amounting to over $350,000. Accompanying it was a statement that it was not a notice of assessment, and no payment would be required until the receipt of a formal notice from the Collector. Lawyers were employed to secure a reduction or compromise. On February 11, 1921, the Union Trust Company and other banks and the Hominy Company wrote the lawyers that it was their understanding a compromise could be effected for about $35,000, and that the lawyers' fee would be $20,000; that the company was unable to pay but that the banks would advance the funds, with the understanding that, so far as possible, they would be subrogated to all the rights of the Government as to a prior lien for the tax. The compromise was effected. The check of the Union Trust Company for $35,000 was issued, dated February 23, 1921, payable to the company and endorsed by it to the Commissioner.

On March 17, 1921, the collector received from the Commissioner an assessment of income and profits tax against the company in the sum of over $72,000. On March 18, 1921, at the collector's request, another check for $35,000, payable to him, was substituted for the original check, but it bore the same date, February 23, 1921. The banks claimed that, at the time the compromise payment was accepted, the Government was entitled to a lien on the property of the bankrupt and that it was also entitled to priority of payment of its claim for tax, and that they were subrogated to all the rights of the Government. The petition for bankruptcy was filed April 27, 1921, and the company was adjudged a bankrupt on May 6, 1921.

Question: Were the banks entitled to priority of payment from the bankrupt's estate?

Decision: A demand on behalf of the United States for the payment of taxes was necessary under the statute to create a lien. Unless the request for the substitution of the checks "constitutes a demand, no demand was made * * * and no lien came into existence." The request for substitution of the checks did not constitute a demand for the payment of taxes. Such a demand must be based upon the assessment, and the assessment was for over $72,000. Any demand must have been for that amount.

"Section 64a of the Bankruptcy Act provides that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of payment of dividends to creditors. This provision manifestly applies only to assets in bankruptcy, and the priority given to the governmental bodies does not arise until adjudication in bankruptcy takes place. If the taxes have been paid prior to the adjudication, they no longer exist, and the priority referred to in the section never comes into existence. * * *

"It is generally held that persons possessed of a real or apparent interest in the property, who pay taxes thereon in order to protect it, are entitled to subrogation to the right of the taxing power. * * * But the banks in this case did not make the payment under compulsion and had no interest in the property."

IN RE BREZIN et al., BANKRUPTS

(U. S. District Court, D. New Jersey, January 25, 1924)
(297 Fed. 300)

Record: Revenue Act of 1918, section 218 (a). Claims in bankruptcy against a partnership for additional excess profits taxes up to January 1, 1918, and against the individual partners for income taxes for the years 1917, 1918, and 1919. The referee allowed the claim against the partnership and disallowed the claims against the individual partners. The Government petitioned for review. Disallowance of the claims for taxes against the individual partners was reversed.

Facts: Brezin and Schaefer, partners, and the partnership, were adjudicated bankrupts in December, 1920. On April 28, 1922, the collector filed proof of claim with the referee for taxes against the bankrupts. The next month he filed another claim for further taxes and in September he filed a claim, combining the two former claims, being claims against the partnership for a fiscal year ending in 1917 and for the additional period up to January 1, 1918, and claims against each, Brezin and Schaefer, for the years 1917, 1918, and 1919. In each of said claims preference and priority of payment was claimed under sections 3466 and 3467, R. S., and section 64, Bankruptcy Act of 1898.

Questions: (1) Was the United States barred from presenting its claim for taxes, not having filed it within one year from the date of adjudication, under section 57 (n) of the Bankruptcy Act?

(2) Where partners allow their profits to remain in a partnership, does such capital of the partnership remain liable for Federal taxes assessed against them individually?

(3) Where partners have net profits in years prior to 1920, which are allowed to remain in the partnership business and which are in effect wiped out in the losses of the partnership of that year, may such losses be deducted so as to extinguish their taxable profits for such prior years?

Decision: (1) Said section 57 (n) provides in part: "Claims shall not be proved against a bankrupt estate subsequent to one

year after the adjudication.'' In re Anderson, 279 Fed. 525 (ante) ''goes no further than to rule that the Government cannot, after notice, indefinitely refuse to present its claim. As section 57 (n) of the Bankruptcy Act fails to name the United States'' there is applicable thereto the well established principle that a sovereign cannot be bound by a statute of limitation in which it is not named. The United States could present its claim after one year, especially as the funds in the trustee's hands to a considerable extent remain undistributed, and property in the course of administration under the Bankruptcy Act is not freed from liens or claims for taxes.''

(2) Each partner was entitled to 50% of the net profits of the partnership, besides his salary. ''The partners, instead of drawing out their respective 50% shares of the net profits from year to year, left a considerable portion in the business undistributed, and during the years 1917, 1918 and 1919 the distributive share of each partner, in excess of the amounts actually withdrawn by him, totalled $26,140.05, or a little more than $52,000 in all, left in the business.

''The Government tax, assessed against the two partners individually for the same three years, totalled $13,701.98, each partner being assessed for approximately one-half thereof and the taxes so assessed not having been paid.

''Pursuant to the conclusions already reached herein above, there would seem to me to be no doubt as to the Government's right to priority of payment, provided only that there be funds in existence properly chargeable with such payments. And in this connection, it must be remembered that the taxes here sought are claimed as having accrued on the various dates when, under the income tax laws then in force, they originally became due and payable. There is no dispute but that on these various days there were actual funds in being, voluntarily left by Brezin and Schaefer among the partnership moneys, and which, if they had been claimed by the partners as individuals—as with perfect propriety they could have been claimed under the articles of copartnership—would have more than sufficed to put the individuals in possession of resources out of which these taxes could have

been paid and satisfied. Has the refusal or neglect of the partners to claim their individual rights from time to time; their election to leave their respective personal moneys in their business enterprise so changed the character of those moneys; so undermined the Government's claim as practically to nullify it, and, at the same time, put in possession of the trustee, for the benefit of partnership creditors, many thousands of dollars which, as the result of the partner's mere election, are listed as partnership funds; whereas, they were actually at all times throughout the period herein involved, individual funds, even though unclaimed? I believe not, and although, as claimed by counsel for the trustee, there is, under the terms of section 3186, Revised Statutes, no specific statutory lien in this case. I am yet of the opinion that section 3466, Revised Statutes, and 64 (a) of the Bankruptcy Act to give the Government a priority right in the premises, and that such priority right as thus set forth is a declaration of the common law right of the sovereign to be first paid.

(3) "It should be borne in mind that this proceeding is not designed to tax the partnership for taxes due from the individuals and therefore runs in nowise counter to the Revenue Act of 1917 and 1918. The taxes herein have been assessed against the individuals, and all that is now sought is an available and proper fund out of which to collect the same, as so assessed." Both of the individual partners were held to have taxable incomes for the years 1917, 1918 and 1919.

IN RE CAPITOL TRADING COMPANY, INC.

(U. S. District Court, N. D. New York, February 21, 1916)
(229 Fed. 806)

Record: Emergency Revenue Act of November 22, 1914. Review of action of referee in refusing for want of a revenue stamp, to file certain letters of attorney in a bankrptcy proceeding. Order affirmed.

Facts: Certain creditors of the bankrupt executed powers of attorney to their attorneys of record authorizing them to vote at certain meetings of creditors and to receive and receipt for

moneys payable to said creditors. The powers of attorney did not have attached revenue stamps required under Act of October 22, 1914, to be attached to powers of attorney.

Question: Is a revenue stamp required on a written power of attorney running to an admitted attorney of the bankruptcy court?

Decision: "If it had been the purpose of Congress to exempt powers of attorney or letters of attorney given to attorneys at law, authorizing them to do certain things in bankruptcy proceedings, I think the exception would have been made. The practice of requiring creditors in bankruptcy proceedings to produce powers of attorney authorizing attorneys at law to vote for trustees has been well understood for many years. * * * Congress did provide that no stamps shall be required upon papers necessary to be used for the collection of claims from the United States for pensions, back pay, bounty, or for property lost in military or naval services. * * * It cannot be assumed that ordinary powers of attorney used in bankruptcy proceedings were not within the contemplation of the law-making body."

IN RE CARNEGIE'S ESTATE

HOME TRUST COMPANY et al. v. STATE TAX COMMISSION

(N. Y. Supreme Court, Appellate Div., First Dept., November 3, 1922)
(196 N. Y. S. 502)

Record: New York Transfer Tax Law, as amended by the laws of 1919. From an order of the Surrogate (191 N. Y. S. 753), affirming an order fixing a transfer tax, both parties appeal. Affirmed, as modified. (Affirmed, without opinion, in 236 N. Y. 517.)

Facts: Andrew Carnegie died August 11, 1919. Letters testamentary were granted to the Home Trust Company. The appraiser fixed the transfer tax, and his action was affirmed by the Surrogate.

Sometime before his death, Mr. Carnegie transferred certain securities to the Home Trust Company, and in a letter he directed

that the income therefrom be used in paying certain pensions which he created for certain veterans and their widows, certain retired railroad employees and their widows, certain retired teachers and certain old friends, servants, etc. The State Tax Commission insisted that all of said fund was taxable and it was conceded that such part of it as represented the reversionary interest of the grantor was taxable. Later he added to this fund, and executed a formal paper in which he reserved the right to revoke or change. In the original will, there was no reservation of power to revoke.

By his will, he made certain gifts to charities and provided that if any gift should be determined invalid or if they aggregated over half of his estate, the excess should go to his widow absolutely. The gifts to charities were more than half of the estate. The Surrogate deducted the debts and divided the remainder into two equal parts. The State Tax Commission contended that there should also have been deducted the expenses of administration.

Against the contention of the executor certain real estate owned by deceased and his wife as tenants by the entirety was included in the taxable estate.

The executor further contended that the federal estate tax should have been deducted in determining the value of the property transferred and subject to the tax.

Questions: (1) Should the pension fund be included in the taxable estate?

(2) Should the expenses of administration be deducted with the debts, before determining the half of the estate given to the charities?

(3) Should the real estate owned by deceased and his wife as tenants by the entirety be included in the taxable estate?

(4) Should the federal estate tax be deducted in determining the value of the property transferred and subject to tax?

Decision: (1) The State Tax Commission contended that, as Mr. Carnegie reserved the power of revocation of the pensions, no fixed right vested in the beneficiaries until his death and that

they were therefore taxable. The greater part of the fund was placed in trust under the letter, which contained no power of revocation. The power reserved in the subsequent deeds "would at most attach only to such portion of the trust fund as was transferred under the terms and conditions of those deeds." The court said that there was "no evidence before us that Mr. Carnegie ever exercised the power of cancelling a pension, or in any manner exercised the powers reserved in the deed * * * and the fact that Mr. Carnegie 'did not make use of it up to the time of his death precludes the presumption that he would have done so at any time.' * * * The title and possession of of the fund vested in the trustee. On his name being placed upon the list of beneficiaries, the pensioner entered upon the enjoyment of the portion of the income alloted to him. Therefore both possession and enjoyment of the property passed to others during the lifetime of the grantor, and did not pass to them upon his death."

(2) By the express terms of Section 17 of the Decedent Estate Law "the estate is to be estimated after the payment of the testator's debts, and the devise or bequest is to be valid to the extent of half of the remaining sum. Had the legislature intended that the expenses of administration should also be deducted, it would have so provided."

(3) As to the including in the taxable estate of real estate held by the husband and wife as tenants by the entirety, the court said: "This question has been determined by the Court of Appeals since the decision of the Surrogate herein, holding such an estate not taxable. * * * To this extent the order must be modified."

(4) "The contention that the Federal Estate Tax should be deducted in determining the value of the property transferred has been determined adversely to the appellant in this state." The refusal of the Surrogate to deduct those taxes was sustained.

IN RE CHADWICK

(U. S. District Court, D. Massachusetts, April, 1870)
(Fed. Cas. 2570)

Record: Act of 1866 amending section 14 of the Act of 1864. Petition for an attachment by assessor of internal revenue.

Facts: The petition alleged that Chadwick was a shareholder in a corporation, Boston Lead Company, and treasurer and agent thereof, having charge and custody of the books; that he rendered his return for 1869 and was assessed thereon; that petitioner afterwards issued a summons requiring Chadwick to produce the books of the company and give evidence respecting his own liability to an income tax for the years 1865, 1866, 1867 and 1868. A rule to show cause was issued, and Chadwick appeared and moved to dismiss the petition. Petitioner moved to amend. Chadwick filed an aswer insisting on his former objections and on others.

Question: May the taxpayer be required to produce the books of a corporation of which he is a shareholder?

Decision: It was contended that the judge should hear the application ex parte, but the court held that it had a right to issue a rule to show cause, as the issuance of such a rule was the practice in equity cases which required it. This is not a criminal action, as the individual, if in good faith he believes his rights are being infringed, has the right to refuse to testify or to produce documents, and the matter may then be brought before the court. Chadwick appeared but refused to produce the books of the corporation. The statute does not require such production. The books of a corporation of which he happens to be a shareholder "are not books relating to his trade or business and are not alleged to be so in the summons. * * * There is nothing in the statute which makes corporations partnerships or the books of a corporation the books of the individual shareholders." The summons should state "with reasonable certainty, the cause of its being issued; as, that the assessor is dissatisfied with the returns, or the like, and the subject matter of the injury. * * * The summons in such a case as this should be sufficiently explicit

to enable the person summoned to decide whether he is bound to appear or not." The petition was dismissed.

IN RE ENTERPRISE BRASS FOUNDRY, BANKRUPT

(U. S. District Court, W. D. Washington, W. D., October 30, 1923)
(293 Fed. 69)

Record: Bankruptcy Act and Sec. 3466, Revised Statutes. Petition in bankruptcy. Order of referee, giving labor claims priority over income taxes, affirmed.

Facts: The wages amounted to $627 and were earned within three months before the filing of the petition in bankruptcy. Income taxes against the bankrupt in excess of $20,000 were unpaid. The trustee had about $10,000 for distribution and the Collector of Internal Revenue petitioned the referee to deny the labor claims and to pay the full sum upon the Government's claim for taxes. The referee, however, allowed the labor claims and the Government petitioned for review.

Question: Do the labor claims have priority over the claim for income taxes?

Decision: Section 3466, Revised Statutes, "must be construed in pari materia with the Bankruptcy Act. * * * It is apparent that the wages were earned within three months before the date of the filing of the petition in bankruptcy. Under the section quoted, 'labor claims are given priority, and it is provided that debts having priority shall be paid in full'."

IN RE ESSENKAY PRODUCTS COMPANY, BANKRUPT
CANNON, COLLECTOR, v. McKEY

(U. S. Circuit Court of Appeals, 7th Cir., April 14, 1924)
(Not yet reported)

Record: Sections 64a and 64b, Bankruptcy Act, and sections 3466 and 3186, R. S. Petition to review and revise the order of the District Court which had decided that United States taxes were not entitled to priority over preferred wage claims. The order was reversed and the taxes were directed to be paid.

Facts: (No facts are given in the decision and it is confined to a discussion of the law.)

Question: Under the Bankruptcy Act, are taxes entitled to priority over preferred wage claims?

Decision: The court held that the taxes were entitled to such priority.

IN RE ESTATE OF DUPIGNAC

(Surrogate's Court, Westchester County, New York, April 7, 1924)
(204 N. Y. S. 273)

Record: Sections 220, 230, 231, Article X, New York Tax Law. A proceeding was commenced to fix the value of the estate to determine the amount of the State tax imposed upon transfers made by will. On appeal, the *pro forma* order based on the tax appraiser's report was affirmed. A rehearing was granted, and in this proceeding the Surrogate's Court acted as an assessing officer to take proof as to the value of the property transferred by the will. The property was valued and the tax assessed.

Facts: The estate included certain shares of stock in a corporation, the De Laval Separator Company. This company manufactured cream separators, milking machines and certain other machinery and appliances. The evidence included the corporation balance sheets, 1913 to 1921, inclusive, and sheets showing net profits and annual dividends. It was stipulated that the manufacturing plant, real estate, etc., should be valued at $2,175,-000. Patents were carried on the books at $100,000, and the good will at over $3,000,000.

Question: What method should be employed in determining the value of the stock, patents and good will?

Decision: The New York statutes levied the tax upon the "clear market value," while in other sections reference was made to "fair market value," and the Surrogate was required to determine the "cash value". These terms were held to be equivalent and synonymous. Decisions cited held "cash value" to mean actual value; "market value" to mean the price which the thing will command in the market; and "fair market value" never to mean the selling price of property at a forced or involuntary sale. "The word 'clear' and 'fair' market value as used in the tax law mean the open or honest market. * * * The word 'market'

value means state of trade as determined by prices pursuant to the law of supply and demand. * * * A share of stock represents the interest which the shareholder has in the corporate and net earnings of the corporation. * * * It is a right in the ultimate assets of the corporation."

This stock was closely held, no sales having been reported for over ten years. The executors offered to prove the value by comparison with the stock or other corporations actively dealt in on the market.

While certain stocks sell below and others above book value, such book value cannot be disregarded. To use the comparative method certain stocks must be selected for the comparison and such a selection cannot be fairly made. "The stocks of companies on the lists submitted by the expert for the estate as selling below book value may be preceded by and subject to prior bond issues, mortgages, or preferred stock. It would be dangerous and wholly unreliable to attempt to compare the value of stock of a company founded upon substantial assets as in the instant case, with the market value of stock of other companies, without evidence as to the assets and liabilities of such other corporations."

"The appraisal of closely-held stock in a corporation with a large capitalization is no different from the assessment of a business with large assets owned by an individual." The rule in determining the value thereof is the same as with co-partnership property.

The method of valuation adopted by the courts is to "ascertain the cash value of the property which the shares represent, assigning to each share its proportionate worth. The book value of stock is its intrinsic value. If there have been no sales, the assessor must necessarily fall back upon the book value as the nearest approximation to the fair market value. In the absence of sales the book value must be taken as the basis of computation. Any other rule would be illogical, and create an impotent conclusion. The use of the words fair market, or clear market value, when applied to closely-held stock is meaningless. Because there is no market to guide, such stock must be appraised at its value,

in money—its intrinsic worth. It can only be compared and measured in money value according to the assets as shown by the balance sheet, less liabilities."

This tax "is not a tax laid on the property affected, but on the privilege of transmitting and succeeding to the inheritance," and therefore the question of unconstitutionality because of inequality cannot be raised. *

As no evidence of the value of the patents was adduced the book value of $100,000 was adopted.

"In arriving at the number, or multiple to be used to multiply the average net annual profits, to ascertain the value of the good will, I have taken into consideration the yearly earnings and the earning power; * * * the business sales; the increased assets; the corporate existence of 36 years; dividends paid; * * * tendency to lesser earnings; the sales of the manufactured article being 50% of the country's consumption; the increased competition; the fact that the welfare of the corporation does not depend upon any one person's business capacity; the reputation and standing of the name in the trade and with the public; its location and permanency.

"In the instant case, in view of all the facts, I have taken five years' purchase as the factor as not unreasonable, nor excessive, and being suitable and proper, having reference to the nature and character of the particular business under consideration."

The total valuation (assets less liabilities) having been determined, a proportionate amount was given to each share of the stock.

IN RE F. G. BORDEN COMPANY

RICE et al. v. CLEMMONS et al.

(U. S. Circuit Court of Appeals, 7th Cir., April 26, 1921)
(275 Fed. 782)

Record: Section 64a, Bankruptcy Act, and Wisconsin Soldiers' Bonus Act of September 11, 1919. Rice, Treasurer, and Wisconsin were enjoined from collecting an income tax. Appeal Reversed and trustee ordered to pay tax.

Facts: The company was adjudged bankrupt on March 22, 1919. The State of Wisconsin claimed a surtax on the 1918 income of the bankrupt under its so-called "Soldiers' Bonus Act". The trustee refused to pay this and his action was sustained by the District Court, a restraining order being issued. The State appealed.

Question: Was the State entitled to be paid from the bankrupt estate its income tax for the bankrupt's income of the preceding year, which had not yet been assessed?

Decision: The court quoted section 64a of the Bankruptcy Act and a certain decision of the Supreme Court in which it was held that "taxes accruing after bankruptcy proceedings are instituted are included among those to be paid" and said: "'All taxes' as used in this section is a comprehensive term. It includes personal as well as property taxes, income as well as real estate taxes. The provision 'legally due and owing' restricts both kinds of taxes. If, when applied to property taxes, it applies to taxes levied subsequent to adjudication, it must necessarily also apply to personal taxes levied after adjudication, but on income earned and received before that date. Had Congress added to the clause 'legally due and owing' the further and modifying clause 'and a charge on the estate of the bankrupt' a different situation would have arisen. * * *

"We conclude that the sovereign's revenue, which the Congress aimed to secure, included income taxes as well as property taxes; that both forms of revenue are covered by section 64a and come within the meaning of the term 'all taxes' as used therein; that the clause 'legally due and owing by bankrupt' modifies 'all taxes' and applies to property taxes as well as to personal taxes; that the estate of the bankrupt was, at the date of adjudication, subject to be taxed upon the income earned during the previous year as well as subject to be taxed on its real and personal property; that the State's claims for such taxes, personal and property, should, under section 64a, be paid out of the general estate of the bankrupt."

IN RE FINKELSTEIN et al.
UNITED STATES et al. v. KAUFMAN
IN RE JONES & BAKER

(U. S. Circuit Court of Appeals, 2nd Cir., April 7, 1924)
(298 Fed. 11)

Record: Sections 218 (a) and 224, Revenue Act of 1918, and Section 5 (f), Bankruptcy Act. Claims in bankruptcy. From decrees of the District Court, affirming orders of the referee disallowing claims for income taxes against partnership assets, the United States appeals. Affirmed. (Certiorari was granted, October 12, 1924, in U. S. v. Kaufman, and in U. S. v. Coxe. The latter is the same case as In re Jones & Baker.)

Facts: The District Court, Southern District of New York, affirmed the order of the referee allowing the claim of the collector against individual assets but not against the partnership assets. In the Jones & Baker case an offer of composition was made to the partnership creditors, whereby they were to receive about 90% of their claims. This offer of composition was confirmed by the District Court, and the receiver was directed to carry it into effect. In July, 1923, more than a month after the appointment of a receiver, the Government, upon a re-examination of the individual tax returns for 1918, 1919 and 1920, assessed certain additional taxes against Jones and his partner. Separate claims for these amounts were filed with the receiver.

In the Finkelstein case, the collector's claim was for an unpaid balance of income tax for 1919 on Finkelstein personally. On October 14, 1920, a petition in bankruptcy was filed against his partnership and against the partners individually. On April 1, 1921, they were all adjudged bankrupt. All the assets of the trustee in bankruptcy were partnership assets and there would be no surplus after the payment of partnership debts. The Government contended its claim was payable from the partnership assets prior to the payment of the co-partnership creditors.

Question: Was the Government entitled to priority as against the partnership assets, for taxes owing from the individual partners?

Decision: The court said that "there is not the slightest warrant for concluding that the tax was against partnerships, and not solely against the 'individuals carrying on business in partnerships.' The language of section 218 (a) is too plain for extended discussion, and its meaning could be fortified, if necessary, by the contrast between the Revenue Act of 1917 and the Revenue Act of 1918 in this regard. * * *

"There is, of course, no doubt that the right of priority of the United States in the collection of taxes is an attribute of sovereignty. * * * Under section 64a of the Bankruptcy Act of 1898, * * * it is the duty of the court to order the trustee to pay all taxes, legally due and owing by the bankrupt to the United States, in advance of the payment of dividends to creditors; but, of course, the tax must be 'legally due and owing by the bankrupt to the United States.' "

If Congress "had intended that the tax against the individuals should be paid out of the partnership estate prior to the payment of the partnership debts it would have so declared by some affirmative language to that effect, either in section 5 (f) of the statute or in some other provision."

A partnership might not be able to obtain credit from banks, etc., if its assets constituted a fund "out of which the debts or taxes due and owing from the individual members are payable prior to or pari passu with the partnership debts. * * *

"Of course, it is always within the power of the Congress to tax the partnership as distinguished from the individuals; but where, as here, no such tax exists, we confess that we are unable to find anywhere in the Bankruptcy Act of 1898 any provision which authorizes the collection of the tax from property which was never taxed."

The court said it was unable to agree with the decision in In re Brezin & Schaefer, 297 Fed 300 (ante).

"Finally, there is no merit in the suggestion that the marshaling provisions are not applicable in the Jones & Baker case, because there the composition in that case was had before adjudication. The composition was only with the partnership creditors, and there was no composition with the creditors of the individual

partners. This was warranted by section 12 of the Bankruptcy Act, as amended June 25, 1910.''

IN RE GOULD'S ESTATE

(N. Y. Court of Appeals, October 4, 1898)

(156 N. Y. 423)

Record: New York tax on transfers of property. The Surrogate adjudged the amount of the tax to be paid by the property of the estate transferred by will. The state comptroller appealed. Affirmed (46 N. Y. S. 506). Appeal. Modified and affirmed.

Facts: Jay Gould, in his will, fixed the value of his son's services theretofore rendered at five million dollars and made bequests totaling that amount, less certain advancements. An agreement was made between Jay Gould and his son, the provision in the will being for compensation under said agreement.

Question: Where a legacy was made in payment of a debt, is it taxable as a transfer?

Decision: ''He could have refused compensation in this manner, and had he done so whatever sum he might have recovered against the estate under the agreement with his father would not have been taxable under the taxable transfer act, for there would have been in such case no transfer by will. This he did not do, but instead elected to accept a transfer of a certain amount of money, bonds, and stocks, under the will, in compensation for his services;''

The court quoted from the taxing statute. ''It will be noted that the imposition of the tax is not limited to property gratuitously given by will, but is extended to all property so transferred.'' The court said the transfer was by will. The decedent ''selected a method of payment which brought the transaction within the taxing provisions of the statute.'' The order was modified on account of the valuation of the property transferred.

IN RE HARRINGTON, BANKRUPT

(U. S. District Court, W. D. Missouri W. D., June 25, 1924)

(Not yet reported)

Record: Claim in bankruptcy for additional taxes for 1918, 1919 and 1922. The claim was disallowed by the referee, who

found an overpayment of $716.38 for 1918 and ordered the trustee to prosecute a claim for refund. The Government petitioned for review. The order of the referee was affirmed.

Facts: It was conceded the Government was not entitled to recover the amount claimed for 1922, because of the intervention of bankruptcy. The referee found:

The bankrupt owned common stock in the corporation, Altoona Cement Company, for which he paid $10,990. That company suspended operations and was insolvent prior to July, 1918, when a receiver was appointed to liquidate its assets. A witness testified that in 1918 the common stock was known to be worthless because there was outstanding other stock preferred in liquidation to the extent of $555,000. In 1918 the receiver turned over the assets to the preferred stockholders. The receivership terminated in 1919, and common stockholders received nothing. The Government contended there could be no determination of the worthlessness of the common stock until the termination of the receivership.

In computing the tax for 1919, the Government did not consider the farming operations of the bankrupt. The bankrupt's books of accounts were not in all particulars satisfactory, but from them might be determined accurately the receipts and disbursements covering the farming operations for that year. He planted a large acreage of rice, made extensive purchases of equipment, and his total deductible expense in connection therewith was $100,157.84. The rice crop was a failure and his total receipts from the farm were $46,550.48, resulting in a farm loss of $53,607.36.

A witness testified, without contradiction, that the partnership of which the bankrupt was a member "had for the years in question as well as for prior years used the completed-contract basis in computing its income, and that this basis clearly and truly reflected the income of the partnership. There was no evidence that this system of accounting did not clearly reflect the income of the partnership, nor that the firm had not consistently used it in previous years. From the evidence I [the referee] find that the completed-contract basis was the method

regularly employed by the partnership in keeping its books, and further, that this system clearly reflects the said partnership's income.''

The testimony showed that the partnership "derived its income principally from long-term construction contracts * * *; that the receipts of fees by the firm, in point of time, bore no relation to the costs or expenses * * *; that the partnership contracts were for the supervision of construction, building and installation of railroad bridges, viaducts and large structures of like nature, the construction of which required more than a single year, and that the partnership expenses incident to said employment included supervision, preparation and submission of blue prints, specifications, maintenance of resident engineers and inspectors on location, as well as other items of expense. These expenses continued from the beginning of the contract to its completion.''

Questions: (1) Was the bankrupt entitled to credit in 1918 as to stock in the corporation then in receivership although the receivership did not terminate until the next year?

(2) Should the bankrupt's loss in 1919 be deducted?

(3) Was the partnership entitled to compute its income on the completed-contract basis?

Decision: (1) "I agree with the referee that the bankrupt was entitled to credit in the sum of $10,990 in the year 1918 for the cost of common stock in the Altoona Cement Company; said company was insolvent and had suspended operations prior to July, 1918. The common stock was known at that time to be worthless, and a satisfactory showing was made of its worthlessness. In such cases it is unnecessary to await the formal termination of the receivership, which occurred in 1919.''

(2) "I agree with the referee that the bankrupt was entitled to a deductible loss, in computing his income for the year 1919, of the sum of $53,609.36, arising from farming operations, and that the records are sufficient to enable the Government and the court to determine accurately the receipts and disbursements covering the bankrupt's farming operations for the year 1919.''

(3) The court said it agreed with the referee that the partnership was entitled to compute its income on the completed-contract basis, and said that this question was material because it bore upon the bankrupt's distributive share in said partnership earnings. Then the court quoted from Section 212, Revenue Act of 1918, Articles 36 and 22 of Regulations 45, an Opinion of the Attorney General and Gould v. Gould, 245 U. S. 1 (ante 237), and said: "This is, of course, the fundamental purpose of the law that the taxpayer should be taxed upon his actual income, and that this should neither be diminished nor increased by any arbitrary or artificial method of computation. As the law says, 'the true income must be clearly reflected,' and for this purpose the regular and long-standing methods of accounting employed by the taxpayers, established in due course and for no ulterior purpose, are to be indulged. In this case it is shown beyond dispute that the firm of which the bankrupt was a member had employed the long-term basis as its method of computing its profits on its engineering contracts, these uniformly extended over a period of years. The firm contracts to do the engineering work for a stated sum, depending, of course, upon certain contingencies. From the gross amount it is to receive must be deducted its expense, consisting of many items, including salaries of subordinates and the establishment of an engineering staff and the outlay incidental thereto. The contract fee nowise reflects the net income. In some years there may be payments on account of fees and small expenses, and in others the expenses are large and the payments on account of fees are negligible. The true profit cannot be estimated until the completion of the work. The method employed by the taxpayer in this case is the logical one, and accords with the justice of the case and the law applicable thereto at that time.

"It is urged that this engineering firm had many contracts arriving at completion at many different periods, and for this reason the work of computing the income upon the long-term basis would be complex and unsatisfactory. But, if the books are kept, as the record shows they are, to show the exact state of the income upon complete contracts in each year, it is not per-

ceived how greater difficulty can arise in the case of engineers than in that of builders and construction work generally. Furthermore, the Government does not seek to secure a return upon income that is not accurate in fact and which casts an unjust burden upon the taxpayer."

IN RE HOFFMAN'S ESTATE

(New York Supreme Court, Appellate Div., March 2, 1923)
(198 N. Y. S. 401)

Record: New York Tax Laws of 1911, 1916 and 1921. Appeal from an order fixing the tax on 144 shares of stock at $6,480. Reversed.

Facts: In assessing a transfer tax the value of stock of decedent was taken as that of a sale of the stock one year prior to death of decedent.

Question: What basis shall be used to determine the value of stock at the time of the death of decedent?

Decision: "The fair market value at the time of the death of the decedent is the value upon which the tax is to be paid. * * * A sale price shown to exist about a year subsequent to the death of the decedent is not sufficient proof of the value of the stock at the time of his death. In the absence of proof of the market value at the time of the decedent's death, the stock should have been valued on the basis of the corporate assets, including good will, earnings, etc."

IN RE HUTTMAN

(U. S. District Court, D. Kansas, Nov. 1, 1895)
(70 Fed. 699)

Record: Petition for writ of habeas corpus by deputy revenue collector. Granted.

Facts: Huttman was subpoenaed as a witness for the State in a criminal action against Davidson, the subpoena requiring him to produce the records of the Internal Revenue office showing transactions between the collector and Davidson touching an application for a special retail liquor dealers' stamp supposed

to have been made by Davidson. On motion of the U. S. attorney the subpoena duces tecum was quashed so far as it required the production of said records. Huttman was asked to testify regarding alleged statements made by Davidson touching said application. He replied that Davidson had made no such statements except such as were required by law, and said statements were reduced to writing and became a part of the records of the office; that such statements were privileged, having been made for revenue purposes alone; that all statements which might be made by Huttman in that regard would be statements of the contents of said records, and for that reason and because of instructions from the Commissioner of Internal Revenue, in the regulations, he respectfully declined to answer. He was committed to jail for contempt of court, to remain until he answered. He petitioned the United States Court for a writ of habeas corpus.

Questions: (1) Was the witness justified in refusing the desired testimony?

(2) Does the United States District Court have authority to issue a writ of habeas corpus in such a case?

Decision: (1) Congress gave the Commissioner the power to make all reasonable regulations to control his subordinate officers in the matter of the collection of internal revenue. "These regulations are not to be questioned by this court, but must be upheld and enforced, and they must be regarded by all as having the same force as an Act of Congress." The questions asked "the deputy collector, if answered, would have required him to divulge communications made to him by an applicant for a special tax, with the express and understood purpose of making the record itself. * * * If the records can not be produced, how can the conversation and action of the parties which led up to the making of such records be produced? * * * I am of the opinion that the petitioner was right in declining to answer the questions."

(2) The statute "expressly says that the writ may issue where the petitioner is in custody for an act done or omitted in pursuance of a law of the United States or is in custody in violation of the constitution or laws of the United States. Even if the

statute did not cover the case, the writ would issue if the State court had no jurisdiction or power to require the petitioner to answer the questions propounded to him."

IN RE J. MENIST & COMPANY, INC.

(U. S. Circuit Court of Appeals, Second Cir., April 9, 1923)
(290 Fed. 947)

Record: Income Tax Act, September 8, 1916. Petition to revise and appeal from order of the District Court for the Southern District of New York. Affirmed. (Certiorari was granted in U. S. v. Childs, 263 U. S. 691.)

Facts: The United States assessed an additional income tax against the bankrupt for 1917, and, as no payment was made, filed a claim in the Bankruptcy proceedings for the said tax plus 5 per cent penalty and 1 per cent interest per month until paid. At the hearing below the United States withdrew its claim for the penalty of 5 per cent but insisted upon the demand for 1 per cent per month as interest. The lower court held the so-called interest at the rate of 1 per cent per month amounted to a penalty and therefore allowed the tax with interest at 6 per cent to be computed to the day of the date of payment by the trustee.

Question: Was the bankrupt liable for interest at the rate of 1 per cent per month, as claimed?

Decision: The court held that under the Bankruptcy Act a tax is considered a debt, and that a penalty may not be recovered, except the amount of the pecuniary loss sustained in the proceeding out of which the penalty arose. The court held that interest at the rate of 1 per cent per annum amounted to a penalty although called interest and affirmed the order of the court permitting the United States to recover interest at the rate of 6 per cent from the time the tax became due until the same was paid by the trustee.

Ordinarily interest stops when a petition in bankruptcy is filed, but the Bankruptcy Act requires penalties due the United States or a state, etc., to be allowed to the extent of the pecuniary loss, and the loss continues as much after petition filed as before.

IN RE J. MENIST CO., INC.

(U. S. Circuit Court of Appeals, Second Cir., December 10, 1923)
(294 Fed. 532)

Record: Bankruptcy Act, Section 57n. Appeal from order of District Court denying motion of trustee in bankruptcy to expunge claims of the United States for taxes filed after one year from adjudication. Affirmed. (Certiorari was granted in U. S. v. Childs, 263 U. S. 691.)

Facts: Adjudication of bankruptcy was made on April 5, 1920. After the expiration of the year for filing claims the United States filed two claims for taxes. These claims covered unpaid income taxes for 1917 and 1918 and interest. The trustee in bankruptcy moved to expunge the claims. The motion was denied and the trustee appealed.

Question: Is the United States bound, as to taxes, by Section 57n of the Bankruptcy Act, providing that claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication?

Decision: "No case has held that the sovereign can be bound by a statute of limitations, unless that concession is clearly made by specifically naming the sovereign in the statute. * * * We appreciate that section 57n is one of the provisions of the Bankruptcy Act which has for its purpose an expeditious winding up of a bankruptcy estate; but, under our decision in Re Anderson, 279 Fed. 525, the trustee may avail of a simple and practicable method whereby the United States receives notice and thus is required promptly to prove its claim for taxes. The practical difficulties which would attend the requirement that the government should be held to the statutory limitation of section 57n are so great that we see no warrant for assuming that Congress intended, in that regard, any departure from the rule that the United States of America must be named before it can be bound by a statute of limitations."

IN RE KALLAK

(U. S. District Court, D. North Dakota, September 13, 1906)
(147 Fed. 276)

Record: Bankruptcy Act of 1898. The question certified was as to whether there should be paid from the bankrupt estate, taxes past due with penalties and interest up to the time of payment. The order of the referee directing such payments was confirmed.

Facts: Among the debts listed by a bankrupt were State taxes which became due December 1, 1905, and became delinquent March 1, 1906, at which time a penalty of 5 per cent was added. Thereafter on the first of each month a further sum of 1 per cent of the original tax was added. The trustee offered to pay the amount of the original tax with the penalty and interest which had accrued prior to April 16, 1906, the date of the adjudication. This was refused, the claim being that the State was entitled to further interest up to the date when the payment was actually made. The referee ordered payment in full, with penalty and interest to the date of payment. The trustee had the question certified to the court for review.

Question: Are taxes claims against the bankrupt estate to be paid with other claims in the ordinary course of administration and do interest and penalties thereon stop at the time of the adjudication?

Decision: Taxes do not constitute a "claim" in bankruptcy. The public authorities have no right in the administration of the estate as creditors and no voice in the selection of a trustee and the liability for taxes is in no way affected by the discharge of the bankrupt. "It is the duty of the trustee to ascertain from the public records the amount due for taxes and bring the matter to the attention of the court, and thereupon it is the duty of the court to order payment if there are sufficient funds in the estate for that purpose." The Bankruptcy Act provides that before anything shall be paid to the creditors, all taxes owing by the bankrupt shall be fully discharged. "Whatever would be owing by the bankrupt at the time the payment is made, if no bank-

ruptcy had intervened, that the court should require the trustee to pay. It includes the original tax and all other sums accrued thereon under the revenue laws of the state up to the time the payment is actually made or tendered. The decision of the referee is therefore affirmed."

IN RE KITTENPLAN

(U. S. District Court, S. D. New York, July 20, 1922)
(285 Fed. 62)

Record: Bankruptcy Act. Petition to review and revise an order of the referee, awarding priority of payment of wages to a claim of the United States for taxes. Order of the referee reversed.

Facts: (Stated in record above).

Question: Which is entitled to priority of payment, taxes or preferred wage claims?

Decision: "In making the order complained of, the referee relied upon the decision of Guarantee Title & Trust Co., Trustee v. Title Guarantee & Trust Co., 224 U. S. 152 [post] * * *. That case, as I read it, is authority for the proposition that preferred labor claims have priority over debts owing the United States. The court, however, in rendering its decision, expressly said: 'The only exception is "taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality." These were civil obligations, not personal conventions, and preference was given to them * * * by the act of 1898.' " "In Section 621 of the recent edition of Black on Bankruptcy, it is said: '* * * But a claim for taxes due either to the United States or to a State, is entitled to priority over all other priority claims, even over the trustee's commissions and his necessary expenses.' " In support of this statement of what he conceives to be the law, Mr. Black cites the decision of Judge Hough in In re Weiss, 159 Fed. 295.

The case of In re Weissman, 178 Fed. 115, states that in enacting Section 64a of the Bankruptcy Act "* * * Congress seems to have placed valid and subsisting taxes in a class by themselves and of the highest rank." Debts with respect to which wage

earners are given priority, are specified in subdivision (b) of Section 64 of the Act; and thus come within a different and subordinate category to exactions imposed for the support of the Government.

IN RE ROSENBERG'S WILL

(New York Supreme Court, Appellate Division, 2nd Department, December 14, 1923)

(202 N. Y. S. 324)

Record: Section 309, Surrogate Court Act of New York. Judicial settlement of accounts of executor and trustee. Additional testimony ordered taken.

Facts: There was a close issue of fact as to whether or not Morton Rosenberg was a partner with his deceased father, Charles Rosenberg. Certain federal income tax returns were excluded from evidence.

Question: Were federal income tax returns admissible to determine the question whether a partnership existed?

Decision: "Evidence concerning income tax returns made by Morton Rosenberg, individually and as executor of the estate, was improperly excluded. In 1917 there was an affirmative duty on a partnership to file a statement for the purpose of fixing the excess profits tax. For the year 1917 partnership income as such was taxable for excess profits. For every year since that time, although partnerships are not taxable as such, partners are required to make an annual return as informative of the profits of the partners. This apparently is exacted of the partners as a check upon the individual returns filed by them in their individual capacities."

The court then referred to the regulations of the federal government regarding the inspection of returns, which it said might be taken judicial notice of by the courts. "Evidence of the contents of these reports should be before the court * * * as well as any returns filed with the state authorities."

IN RE TEMTOR CORN & FRUIT PRODUCTS COMPANY

(U. S. District Court, E. D. Missouri, E. D., April 5, 1924)
(299 Fed. 326)

Record: Petition for review of allowance by referee of claim of United States for balance of income tax for 1920. Petition denied and report of referee confirmed.

Facts: The Temtor Company and the Best-Clymer Manufacturing Company, which also became bankrupt, filed a consolidated return for 1920 on the assumption that the Temtor Company was the parent corporation and the Best-Clymer Company its subsidiary. The Temtor Company paid three quarterly installments of the tax assessed. In December, 1922, the Commissioner made an additional assessment on the basis of the consolidated return, resulting from the disallowance of certain items of depreciation. The claim was for this additional assessment and the fourth installment of the original assessment, and interest, with certain adjustments. The trustee claimed that included in the consolidated return was an item of rental from which $1,000,000 should be excluded as it was improperly reported; that a consolidated return was not proper, and that even though a consolidated return was proper the government was required to apportion the tax as between the two companies. The referee decided there was no reason for excluding the $1,000,000 rental; that a consolidated return was proper; that as the payment of the entire tax by the Temtor Company was according to agreement between the two companies it was proper, and that the government was entitled to priority of payment.

Question: In the provision of the statute regarding consolidated returns, what is the meaning of "substantially all of the capital stock of the other," and had the Commissioner power to say in the regulations that those words meant "ninety-five per cent of the voting stock?"

Decision: The court adopted the findings of fact of the referee and concurred in his conclusions of fact but said it was unable to concur in all his conclusions of law. Referring to the provision of the statute for a consolidated return when one cor-

poration owns "substantially all of the capital stock of the other" the court said: "But the question of the fact of affiliation is left, by the very definition of what constitutes affiliation, even in the statute itself, a matter of judicial construction, and not a matter of administrative or departmental regulation. For the language of the section is 'That corporations which are affiliated within the meaning of this section, shall under regulations to be prescribed by the Commissioner * * * make a consolidated return.' Further on in this section there is a statutory definition of what constitutes affiliation. So, it is too obvious for argument, that it is not left to the Commissioner to prescribe what constitutes affiliation, for the statute fixes that, but what is left to be prescribed by the Commissioner's regulation is the manner of the making of the return. In short, the law itself says *who* shall make a consolidated return. The Commissioner may only say *how* such return shall be made.

"The commissioner, then, had no power to say * * * that 'substantially all of the stock of the other' means 'ninety-five per cent of the voting stock.' It is a matter for the courts to construe, * * *. Here in this case all of the voting stock was held by the bankrupt, though there were some three thousand other stockholders holding preferred stock, which had no vote until dividends were passed for a stated period. I readily appreciate that the control of one corporation over another is ordinarily had by reason of control of the voting stock therein, and not through control of the non-voting stock. It is also true, that no one is to be taxed unless there exists a statute which authorizes the imposition of the tax. Such a statute is, however, to be given a reasonable construction, when it in fact exists, with a view to carrying out its purpose and intent. * * *

"* * * Congress had in mind voting stock only, or such stock as carried control by one corporation over its affiliated corporation. * * * From what is said, it follows that the construction of the word 'substantially' is also a matter for the courts, however valuable as a rule of practice and administration it may be, to have fixed by the Commissioner a merely arbitrary standard."

IN RE WEST COAST RUBBER CORPORATION, INC.
UNITED STATES et al. v. OLIVER et al.

(U. S. Circuit Court of Appeals, Ninth Cir., July 2, 1923)
(290 Fed. 160)

Record: Bankruptcy Act. Petition for revision of order of District Court (283 Fed. 351). Order reversed. (Certiorari granted, 263 U. S. 695.)

Facts: The bankrupt was unable to pay both wages and taxes. The District Court held that the claim for wages was prior in rank to taxes owing by the bankrupt.

Question: Is the claim for wages prior in rank to taxes owing by the bankrupt?

Decision: Section 64a of the Bankruptcy Act directs the court to order the payment of "all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in the advance of the payment of dividends to creditors." Section 64b provides: "The debts to have priority except as herein provided and to be paid in full out of bankrupt's estates * * * shall be [after payment of costs of preserving the estate, filing fees and costs of administrations]: (4) Wages of workmen," etc.; "wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of the proceedings, not to exceed three hundred dollars to each claimant." "We think it is the intention of Section 64a to provide that taxes shall be paid before any payment is made to creditors, whether they be general creditors or preferred creditors. The power to levy and collect taxes is not only an indispensable attribute of sovereignty but it is absolutely necessary to the support of government, the maintenance of law and order, and the protection of life and property. * * * In harmony with the conclusion which we reach are In re Weissman, 178 Fed. 115, and In re Kittenplan, 285 Fed. 62 [ante]."

IN RE WYLEY CO.

(U. S. District Court, N. D. Georgia, October 18, 1923)
(292 Fed. 900)

Record: Bankruptcy Act, Section 64a. Trustee in bankruptcy requested direction as to the distribution of assets of the estate. Directions given.

Facts: The Wyley Co. was adjudicated bankrupt in August, 1922, and the estate was reduced to cash and partly distributed. In December, the United States presented a claim for additional income taxes for the years 1918 and 1919. About two-thirds of this was admitted to be correctly assessed. The remainder consisted of an additional tax resulting from a lessening of the deduction for salaries of officers, it appearing that such salaries as shown on the books and as returned had not been paid in full. State taxes of $400 were likewise owing. The remaining assets in the estate amounted to less than what was claimed by the United States and to but little more than the total of United States taxes admitted properly assessed and the State tax. The trustee in bankruptcy asked the instruction of the court on the questions following:

Questions: (1) What was the proper deduction to be made for salaries of officers, the amount actually paid or the amount credited them on the books of the bankrupt?

(2) Have taxes owing to the United States priority over those owing to a State, in bankruptcy matters?

(3) Have taxes priority of payment over expenses in administration in bankruptcy?

Decision: (1) "The court has power to inquire into and fix the amount due as income taxes to the United States. Bankruptcy Act 64a." The company's tax returns showed salaries to its officers largely greater than those shown by the individual returns of the officers to have been received by them. "The testimony is that the salaries were fixed by the directors at the amounts credited on the company's books," either based on a supposed profit which had not really been earned or not paid for want of ready cash. "If the first * * * the tax returns

should be corrected to eliminate the supposed profit, * * *. If the other * * * the deduction of the amounts absolutely due these officers was correct, though they were never paid, and, of course, now never can be. In either event, the additional taxes assessed on account of these items is held to be erroneous and the true amount due the United States is to be fixed accordingly."

(2) "A tax has such lien and priority, and only such, as is given it by statute." Bankruptcy Act, Section 64a, provides: "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors." The intent of "Congress was that there should be a pro rata payment upon all the taxes named in Section 64a, when the available fund is not sufficient to pay in full, the taxes due the United States having no priority over the others."

(3) "Section 64a gives the payment of taxes express priority only over 'dividends to creditors.' The fees and expenses of officers of the court are hardly to be so described." Under R. S. 3466, giving priority to debts due the United States, costs of administration have been always first paid.

INTERNAL REVENUE AGENT v. SULLIVAN et al.

(U. S. District Court, W. D. New York, March 2, 1923)
(287 Fed. 138)

Record: Act of 1921. Application of Internal Revenue Agent to require the respondent to produce books, records, etc., pertaining to the incomes of himself, a corporation, and partnership. Motion denied.

Facts: Respondent was willing to produce the books and records of the corporation, but not of himself as an individual, nor of the partnership of which he was a member, on the ground that to do so might criminate him, and might furnish evidence to the prosecution of an indictment pending against him for conspiracy to defraud the United States during the year 1920 in transactions relating to the purchase of lumber from the Government and its subsequent sale. He claimed protection under the

Fourth and Fifth amendments to the Constitution of the United States. The Internal Revenue Agent claimed such records under Sections 1308 and 1310 (a) of the Act.

Question: May the respondent refuse to produce his books and records on the ground that the production of the same would tend to incriminate him?

Decision: "There is nothing contained in the papers before me indicating bad faith, or that the fears of respondent are unreal, or that they arise from a remote or improbable possibility. The facts sufficiently show that to produce his books for inspection and examination may apprise the Government of evidence or a link in a chain of circumstances that may tend to convict him of the crime of conspiracy, for which he is indicted and now awaiting trial. The contention of the Government, that it is not specifically claimed by respondent that the books, if produced, will criminate him of a violation of the Income Tax Law, or that no subpoena has been issued in connection with the conspiracy charge, requiring their production, or that primarily the examination and testimony is only to determine taxable income, is not in this aspect of material importance."

"The right of inspection and examination should not be denied on the ground of unreasonable search, if complete protection from discovery can be given, for, like others, the respondent must submit to the proper procedure for the collection of taxes on his income, or to the procedure for ascertaining the correctness of any return that may have been filed by him. But it is patent that he cannot, under any rule familiar to me, obtain the complete protection in his constitutional rights to which he is entitled, if the motion is granted. Congress has not provided immunity for the protection of a person testifying as a witness in such a proceeding as this, either orally or by the enforced production of books and papers."

"It is of course desirable that the respondent should not be permitted to circumvent the Income Tax law nor avoid payment of taxes to which he is justly liable, and therefore the order to be entered herein, denying the motion of the Government, will be

without prejudice to a renewal, within the statutory period period, and after the trial of the respondent on the indictment pending against him."

IREDELL, COLLECTOR v. DeLASKI & THROPP CIRCULAR WOVEN TIRE CO.

(U. S. Circuit Court of Appeals, Third Cir., July 5, 1923)
(290 Fed. 955)

Record: Revenue Act of 1917. Action to recover taxes paid under protest. Writ of error brought by collector to reverse judgment rendered against him by District Court of New Jersey (268 Fed. 377, ante 177). Judgment affirmed.

Facts: In 1911, the plaintiff ceased to conduct any other business except that of granting licenses under its patents. Its capital was reduced from $100,000 to $10,000; and in 1917 its combined capital and surplus was $12,000, which was used as a fund from which to advance salaries, wages, etc., and to provide office equipment. The Government assessed the plaintiff under Section 201 on the basis of a fictitious capital constructed under Section 210 of the Act, at the comparative rate, as provided for in cases where the Secretary of the Treasury is unable satisfactorily to determine the invested capital, whereas the plaintiff contended it was entitled to be assessed under Section 209 at the 8 per cent rate as a business "having no invested capital or not more than a nominal capital."

Question: Were the taxes assessable under Section 201 of the Revenue Act of 1917, or under Section 209, whereby the excess profits tax is assessed upon corporations employing no invested capital or not more than nominal capital?

Decision: "We are of the opinion that the facts of this case clearly bring the plaintiff company under the provisions of Section 209. It was, as provided by the section, engaged in a trade or business having a nominal capital. It was not a producer or manufacturer but its entire business was simply to collect and distribute the rental or royalty charged for use of its patents and as it may, in accordance with said section, be assessed with 'a tax

equivalent to 8 per centum of the net income of such trade or business' it follows by the terms of the section this shall be 'in lieu of the tax imposed by Section 201.' * * * It follows that an attempt by departmental construction to theoretically swell that nominal capital into a large amount, simply because its business on its nominal capital proved highly remunerative, is at variance with the taxing statute and with the principle that the right to impose taxation must have clear statutory warrant and that doubtful constructions must be resolved in favor of the taxpayer."

IRWIN, COLLECTOR, v. GAVIT

(U. S. Circuit Court of Appeals, 2nd Cir., December 10, 1923)
(295 Fed. 84)

Record: Act of October 3, 1913. Action at law by Gavit against the Collector to recover income taxes and penalties paid. Demurrer. Judgment for the plaintiff. Writ of error. Affirmed.

(Certiorari granted, 264 U. S. 579.)

Facts: The taxes were for the years 1913, 1914 and 1915. Brady died, leaving a will which gave certain property to the trustees, part of the net income therefrom to be paid to Gavit during his life or until his daughter became twenty-one or until her death, if she died before becoming twenty-one. The Collector treated the moneys so received by Gavit as taxable income, while he claimed that they constituted a legacy and were not taxable.

Question: Were the payments to Gavit taxable income or a legacy which could not be taxed?

Decision: "Under the provisions of this will, the defendant in error received a certain portion of the increase of the estate of the testator for a definite period; * * *

"The gift received by the defendant in error is measured by the increase of the corpus of the estate, but this does not change the status of his position and what he receives continues to be a legacy or bequest and he is still a legatee. But it is urged by the plaintiff in error that, instead of receiving a definite sum or a definite portion of the corpus of the estate, the gift ceased to become a legacy and became income because it was paid as received from the earnings of the corpus of the trust fund. A

sum of money invested under the terms of a will, the income of which is paid to the testator's son for life, and at his death, the principal to a third party, is a legacy under the New York law. * * * If this was solely a gift from the testator which came to him through a period of not to exceed 15 years (since his daughter was but 6 years of age), the fact that the amount was not definitely known and was not measured by a different method than a fixed share of the corpus of the estate, cannot alter its character as a gift or bequest. * * *

"We are satisfied that the bequest to the defendant in error was not income under the act of 1913, and under section 2 B this sum is expressly excepted in determining what his income is for the purpose of taxation, as the act provides that net income of a taxable person shall not include the value of property acquired by gift, bequest, devise or descent. * * * Under the Act of October 3, 1913, the levy, assessment and payment is upon the net income of any person residing in the United States, though not a citizen thereof under section 2 A, subd. 1. And under subdivision 2 'individuals' are charged with the normal tax and every 'person' subject to additional tax must make a 'personal' return and the net income of a taxable 'person' is defined in section 2 B. There is nothing in the act which makes an estate a 'citizen' or a 'person' and the income of an estate is therefore not taxable. The 1916 act indicated a congressional intention to levy and impose an income tax upon an estate. * * *

"While the moneys received by the defendant in error are income as to the estate, they are not income as to the defendant in error. We think that he acquired the moneys by bequest or devise, and they are not taxable."

ISELIN v. UNITED STATES

(U. S. Court of Claims, May 5, 1924)
(Not yet reported)

Record: Section 800 (a) (3) and (5), Revenue Act of 1918. Suit for the recovery of taxes paid. Plaintiff's petition dismissed. (Pending in Supreme Court.)

Facts: Georgine Iselin owned 300 shares of stock of the Metropolitan Opera & Real Estate Company, and by virtue thereof she was entitled, rent free, to a certain box of six seats for performances of the Metropolitan Opera Company. In consideration of $9,525 she sold these seats for 47 performances from November, 1919, to April, 1920. On or about December 30, 1919, she made a return and paid the tax thereon, without protest, under the provisions of Section 800 (a) (5) of the Revenue Act of 1918, said return being based upon an admission price of $60 per performance. Under date of December 24, 1919, the Commissioner ruled that taxes should be payable in such a case under Section 800 (a) (3). The established price at the box office for such seats was $60 for each performance. In compliance with said ruling, plaintiff made a return to the Collector, setting forth the transactions and paid under protest a tax of over $3,000, being a tax equivalent to 50 per cent of the excess of said sum of $9,525 over an amount of $60 for each of said 47 performances. Thereafter she presented a claim for refund which was denied. Then she brought this suit.

Question: Was she required to pay the tax under Section 800 (a) (3)?

Decision: The court quoted said paragraphs (5) and (3) and said as to said paragraph (3): "The tax is imposed upon persons who sell tickets at news stands, hotels, and places other than the ticket offices of theaters, operas, or other places of amusement. From the wording of the statute, then, it makes no difference where the tickets are sold by the person selling them."

It was the purpose of Congress that if the tickets were sold for more than 50c in excess of the established price, plus the amount of the tax, a tax of 50 per cent of the total amount of such excess shall be imposed. "The plaintiff is not exempt from the tax imposed by paragraph (3) unless she can demonstrate that the tickets sold by her are not included in the provisions of that paragraph.

"The plaintiff in order to do this contends that having paid the tax imposed by paragraph (5) she is exempt from paying

the tax imposed by paragraph (3), no matter at what price she may have sold the tickets for her box.

"When Congress enacted paragraph (5) of the statute the evident purpose was to reach by a larger tax persons who were able to have the permanent use of boxes in an opera house, or who had a lease for such boxes. It was not assumed that such persons would sell tickets for these boxes, or if it was, Congress might well have considered that paragraph (3) would apply as well to such persons as to other sellers of tickets. There is nothing in paragraph (5) which of itself exempts the holders of boxes from the provisions of paragraph (3). * * *

"The government in ascertaining the tax for which the plaintiff was liable under paragraph (5) fixed the price of the box of the plaintiff at $60 or $10 for each ticket. She paid this tax without protest and thereby acquiesced in and agreed that $60 was the price of the box for purposes of taxation under paragraph (5)."

JOHN B. SEMPLE & CO. by JOHN B. SEMPLE et al. v. LEWELLYN, COLLECTOR

(U. S. District Court, W. D. Pennsylvania, July 30, 1924)
(Not yet reported)

Record: Revenue Act of October 3, 1917. Suit to recover part of tax paid. Judgment for defendant.

Facts: Plaintiff was a Pennsylvania corporation, which was dissolved by order of court of December 22, 1919. Semple and the others, directors, were engaged in winding up its affairs. Prior to its dissolution, the company had filed its returns and paid the taxes shown to be due thereunder for 1916, 1917 and 1918. An audit of its books was later made by the government to determine the actual amount of tax due for those years. The examiner reported an overpayment for two years and an underpayment for the other, the overpayment being more than $30,000 in excess of the underpayment. The Commissioner authorized plaintiffs to file a claim for refund of this amount. Plaintiffs then filed a protest alleging that over $3,000 had been erroneously

assessed against them for 1917 and was wrongfully withheld, resulting from an erroneous calculation of the 4 per cent income tax due for the fiscal year ending May 31, 1917. Defendant filed an affidavit of defense equivalent to a demurrer, claiming that plaintiffs' calculation was incorrect and that the amount of the tax could not be recovered because it was not paid under protest.

Questions: (1) What was the proper calculation of the tax in this case?

(2) Might recovery be had from the collector under these circumstances, although the tax was paid without protest?

Decision: (1) The court said that this controversey arose from a difference in interpretation of sections 4 and 29 of the act of October 3, 1917, and it quoted those sections. To arrive "at the tax imposed by section 4 of the act of October 3, 1917, the Commissioner has subjected five-twelfths of the difference between the net income for the fiscal year and the Excess Profits Tax to the 4 per cent tax."

Plaintiffs contended that the 4 per cent tax thereunnder applied only to the difference between the net income for the five months in 1917, less the excess profits tax. "Section 29 must be considered in connection with and as a part of the whole Revenue Act of 1917, and not merely as an amendment of section 1211 of the Revenue Act of 1916 applicable to the 2 per cent tax alone. The Excess Profits Tax was applicable only to income arising subsequent to January 1, 1917; and so also was the 4 per cent tax. Under such circumstances, plainly the Excess Profits Tax should be credited only against the 1917 part of the income of the fiscal year, not against income not subject to that tax. * * * The vice of defendant's interpretation of the Revenue Act of 1917 is made plain by the effect of it. The Act of 1917 specifically provides for a 'tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter.' The effect of the interpretation of the Bureau of Internal Revenue would be the collection of the 4 per cent tax upon part of the 1916 income. This means, if the interpretation is to be sustained, that Congress in-

tended the Revenue Act of 1917 to be retroactive to the extent of imposing the 4 per cent tax on income accruing prior to January 1, 1917, and also intended to discriminate against a corporation whose fiscal year ended on some date other than December 31. * * * The Act of 1917, Section 4, plainly confines the Excess Profits Tax and the 4 per cent tax to 1917 income."

(2) Taxes voluntarily paid cannot be recovered, but " it cannot be claimed that plaintiff voluntarily paid the amount claimed in the present action. It by no means follows from this conclusion, however, that the plaintiff is entitled to recover the amount due it by a personal action against the collector. * * * In the instant case, the plaintiff, without protest, paid certain sums to the collector as its taxes for the years 1916, 1917 and 1918. Pursuant to power conferred upon him by statute, Section 252, Revenue Act of 1918, the Commissioner of Internal Revenue made an order for the return to plaintiff of overpayments of taxes for 1916 and 1918, less a certain amount assessed against it by him as still due upon the tax for 1917. In the assessment set-off, he wrongly included, as we find, the sum of $3,315.72. In such case the plaintiff had a cause of action, as we believe, but not against the collector, who had no part in the illegal assessment, and who by no legal fiction could be held liable for the act of the Commissioner. Plaintiff's remedy is by action against the United States, either in the Court of Claims or in this Court under Section 24, Paragraph 20, of the Judicial Code."

JOHNSON v. KEITH, COLLECTOR

(U. S. District Court, E. D. New York, September 19, 1923)
(294 Fed. 964)

Record: Sec. 5 (a) (3), Revenue Act of 1916, as amended by the Act of 1917. Action to recover taxes paid. Judgment entered for plaintiff on the pleadings.

Facts: The petition stated that Johnson died intestate; and that plaintiff, as administratrix, filed her return for the income received by her as such but she was not allowed to make any deduction in such return for the inheritance tax paid, as adminis-

tratrix, to New York and other States. Defendant interposed a demurrer.

Question: Ought the amount paid to the State of New York for inheritance tax, to have been allowed as a deduction in determining the income tax?

Decision: "The New York inheritance tax is not imposed upon the beneficiary, and is not payable by the beneficiary. * * * While there are variances between the Federal Estate Tax and the New York Transfer Tax Laws in respect to rates charged, the exemptions permitted, and the deductions authorized, as well as in other particulars, the intrinsic nature and purpose of the tax is the same in each case, and has been so held by the New York state court, which allowed the transfer tax paid by an estate to be deducted in determining the estate's income tax under the State laws."

The tax is imposed upon and payable by the estate and should have been allowed as a deduction to the estate, and as the amount of the New York tax was greater than the entire income during the time specified there should have been no tax imposed.

JOHNSTON v. UNITED STATES

(U. S. Circuit Court of Appeals, Second Cir., April 2, 1923)
(290 Fed. 120)

Record: Act of 1918 and Criminal Code, Section 47. Indictment for violation of both laws. Judgment of conviction. Writ of error. Reversed. (Certiorari granted, 263 U. S. 692.)

Facts: The indictment charged the defendant with having willfully failed and refused to account for and pay over sums of money due as an excise tax to the United States on the amount of money received as admissions. It also charged mere failure to account and pay over, etc. Other counts of the indictment charged embezzlement of money belonging to the United States representing the tax paid with the admissions.

The defendant was under contract with a boxing club, a corporation, which had a license from the New York Boxing Com-

mission to give boxing matches. The defendant agreed to hold contests in its hall every month and pay the club a fixed amount. The club agreed to furnish the hall ready for each match and the defendant was to pay the help, the boxers, the boxing officials and the State and Federal taxes.

Questions: (1) Was the defendant, as match maker for the boxing club, responsible to the Government for the admission tax?

(2) Was the money collected as admission tax the property if the United States?

Decision: (1) Only a corporation could, under the New York law, be licensed to hold boxing contests. The club was licensed but the defendant was not. All the contests were held under the club's license. Under the State law the club and not the defendant conducted the contests and collected the money. The defendant was, in the legal sense, only the agent, match maker and manager of the club. The club, therefore, and not the defendant, was responsible for the Federal tax.

(2) There was no embezzlement of the Federal tax money. "The moneys collected at the box office were not the property of the United States." The obligations to make returns and pay the tax did not make the money in the hands of the club or its agent the property of the Government.

JUNEAU v. WISCONSIN TAX COMMISSION

(Supreme Court of Wisconsin, June 3, 1924)
(199 N. W. 63)

Record: Section 1, Article XIV, Amendments to Constitution. Suit was brought questioning the right of the state officials to make public the contents of an income tax return. The decision of the lower court was reversed, and the case was remanded with directions to dismiss the complaint.

Facts: Plaintiff returned income for 1920, 1921 and 1922, while the Wisconsin statutes prohibited publication of information therein contained. Later, such statutes were repealed, whereupon the returns became public records subject to inspection of any person during the office hours, subject to regulations of the

custodian of the return. A taxpayer brought suit, alleging upon information and belief that his returns were being examined by persons for personal and private motives, thus securing information which it would be impossible for such persons to obtain otherwise, and that he feared his competitors might secure information which would injure his credit. The answer denied all but the formal allegations.

Question: Are the plaintiff's constitutional rights invaded by the repeal of the statute which had made the return secret?

Decision: "There is not the slightest evidence in the case that the plaintiff has suffered or will suffer from such inspection of the returns made by him as may be permitted by the officers having charge thereof. It is not shown that any right of the plaintiff in this action has been invaded or that he has sustained any wrong or injury."

Moot questions will not be considered. Even if it be shown that the publication of information in income tax returns injures one taxpayer, it cannot be assumed that it will so operate as to all taxpayers. The court quoted from a decision of the United States Supreme Court in which it was said that it had no jurisdiction to pronounce a statute void because irreconcilable with the constitution "except as it is called upon to adjudge the legal rights of litigants in actual controversies," and then it never anticipates a question of constitutonal law and never formulates a rule of constitutional law broader than is required by the precise facts to which they are applied.

"If information had been exacted from him under the seal of secrecy which the state was not entitled to have or if entitled to have it, only entitled to have it under a provision making the returns confidential and the plaintiff had sustained or was about to sustain some injury, the question of his right to judicial relief would present a bona fide controversy."

KENTUCKY IMPROVEMENT COMPANY v. SLACK

(U. S. Supreme Court, January 5, 1890)

(100 U. S. 648)

Record: Act of July 13, 1866. Action to recover tax paid upon coupons of bonds issued by the company, said taxes being

limited to such bonds of railroads. Judgment for defendant and the company brought a writ of error. Affirmed.

Facts: The company was organized in Kentucky under an Act providing that its business should be mining for coal, etc., and the manufacture and transportation of such products, and that the company should have power to dam a certain river and to hold mining property. Later the corporation was authorized to construct one or more rail tracks from lands owned by it to convenient points on certain rivers, to connect with certain railways and to maintain said track or tracks and draw cars over the same by suitable motive power. It was further authorized to condemn land necessary therefor, on certain restrictions. The shareholders of the company voted to construct such a railroad and they authorized the borrowing on bonds of $500,000, bearing six per cent interest. The bonds were issued. "In addition to its own freight and its own officers and servants, the company transported over its road from time to time for hire other passengers and freight, but there was no provision in its charter in terms authorizing it to convey freight or passengers other than its own." From July, 1868, to February 15, 1870, receipts amounted to over $29,000 for freight in transporting its own iron besides over $4,800 for transporting passengers not connected with the company, and over $3,800 for transporting freight other than its own. Its sales of coal from April 1, 1866, to February 15, 1870, amounted to over $74,000 besides the production of coal for its own use. Its sales of iron amounted to over $470,000. Its sales at its stores at that period amounted to over $506,000. It was contended that the company was a mining and not a railroad company. The court found for the defendant and the company brought a writ of error.

Question: Was the company a railroad company and subject to the tax?

Decision: The court said that when the company was first organized it was a mining and manufacturing company but that its powers and privileges were later enlarged and extended, giving it authority to build tracks and draw cars over the same and

to condemn such property as might be necessary for the construction of such railroad. "Tested by the terms of the charter, it is clear that the powers granted were more comprehensive than are usually found in railroad charters, both in respect to the routes it may establish and the lands and materials the company may condemn and appropriate to such uses. For aught that appears to the contrary they might construct an indefinite number of tracks in any direction from their own lands, and might connect with every other railroad in the State; and in constructing such tracks or making such connections they might without limit condemn and appropriate all such lands and materials as might be necessary and convenient in constructing and maintaining the same, provided the width for the railroad track did not exceed one hundred feet." The stockholders "resolved that a sum not exceeding $500,000 be raised for the purpose of building and equipping said railroad, and to afford facilities for transportation to market for the mineral and other productions of the company's property." The court said that the company was a railroad company indebted for money for which bonds had been issued, and it was held subject to the tax assessed.

KEOKUK & WESTERN R. R. CO. v. MISSOURI

(U. S. Supreme Court, March 12, 1894)
(152 U. S. 301)

Record: Suit for state taxes in state court. Judgment for plaintiff, which was affirmed by the state supreme court. Carried by writ of error to U. S. Supreme Court. Affirmed.

Facts: The Alexandria & Bloomfield R. R. Co. received a special charter from Missouri for the construction of a railroad, February 9, 1857, providing that "the stock of said company shall be exempt from taxation for a period of twenty years after its completion." The road was completed in December, 1872. In 1869 the legislature passed a law authorizing any railroad in the state to consolidate with a railroad company of an adjoining state, providing that such consolidated company should be "entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not taken place." On May 3, 1870,

this company consolidated with an Iowa railroad company. Subsequently the consolidated railroad was sold under foreclosure, and the purchasers conveyed it to the plaintiff in error.

In 1865, a new state constitution was adopted, providing that all statute laws of the state "not inconsistent with this constitution" should continue in force until they expired, and that no property should be exempt from taxation except that used exclusively for public schools and that belonging to the United States, to the state or municipalities. Judgment for taxes was given against the company, which was affirmed by the state supreme court and then the case was taken to the United States Supreme Court.

Question: Did the provision against taxation in the charter of the original company constitute a contract which was violated by the taxation of the company formed by the consolidation?

Decision: The new constitution was adopted prior to the consolidation and before the completion of the railroad. It was conceded the exemption would have continued for twenty years if the consolidation had not taken place. In a former case the state supreme court had held the provision of the constitution mentioned to be a limitation upon the *future* power of the general assembly, but not to be retroactive as to existing laws. "The question then arises whether the Alexandria & Bloomfield Railroad Company, whose charter contained the exemption, is still in existence, or was dissolved by the consolidation, and a new corporation was thereby called into being, which held its property subject to the constitutional provisions of 1865, denying the power of the general assembly to exempt property from taxation."

If the identity "of the prior corporations is preserved, an exemption from taxation, which one of them possessed, falls to that portion of the new corporation to which, under its former name, it had been attached." But if "the consolidation worked a dissolution of the prior corporations, its former privileges and franchises also ceased to exist."

A general rule is "that the taxing power of the state should never be presumed to be relinquished, unless the intention to do so be declared in clear and unambiguous terms."

The state court said that the statute in question authorized a Missouri railroad company to enter into an agreement with a company of another state with whose tracks its road connected, "making one company of the two;" that a new corporate name might be adopted for the consolidated company; that the outstanding certificates of stock might be called in and exchanged for stock in the new company; that a copy of the consolidation agreement should be filed with the secretary of state as conclusive evidence "'of such consolidation, and of the consolidated company.' It is difficult to see how the legislature could provide more clearly for the extinguishment of the prior companies, and the formation of a new one, than by providing that the two companies shall become one; that new certificates of stock shall be issued in exchange for the stock of the constituent companies; and that the consolidation agreement shall be recorded with the secretary of state as the charter of a new company. * * * when the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the date of the consolidation, and subject to the constitutional provisions then existing, which required (art. 11, section 16) that no property, real or personal, should be exempted from taxation, except such as was used exclusively for public purposes; in other words, that the exemption from taxation contained in section 9 of the original charter of the Alexandria & Bloomfield Railway Company did not pass to the Missouri, Iowa & Nebraska Company."

The court referred to the saving clause in the constitution and said that it "referred to statutes in force at the time the constitution was adopted, the operation of which is continued, notwithstanding the constitution. In this case, however, the exemption contained in section 9 of the charter of the Alexandria & Bloomfield Railway Company ceased to exist, not by the operation of the constitution, but by the dissolution of the corporation to which it was attached."

KERBAUGH-EMPIRE CO. v. BOWERS, COLLECTOR

(U. S. District Court, S. D. New York, April 18, 1924)

(300 Fed. 938)

Record: Revenue Act of 1921. Suit to recover income tax for 1921. Motion to dismiss denied and decree entered for plaintiff. (Pending in Supreme Court.)

Facts: Plaintiff owned all the stock of a subsidiary, H. S. Kerbaugh, Inc., which was engaged in the performance of large construction contracts. In order to secure funds for the subsidiary, plaintiff borrowed from the Deutsche Bank of Berlin. On September 1, 1913, there remained unpaid on this loan 6,740,800 marks and a new note for this balance was given in place of the old notes, "both principal and interest being payable in German Reichmarks or their equivalent in United States gold coin at prime bankers' rates in the City of New York for cable transmission to Berlin, Germany." By March 31, 1915, the principal amount had been reduced to 3,216,445 marks. This money was all loaned to the subsidiary for use in financing its construction work; and the carrying out of the subsidiary's contracts resulted in a loss thereof. The subsidiary claimed and was allowed a loss of that amount in its income tax returns for the years 1913 to 1918 inclusive. In that time the net losses of the subsidiary amounted to over $684,000. Of this balance on the note, only 1,893,000 marks were borrowed subsequent to March 1, 1913. After the United States entered the war, the Alien Property Custodian required plaintiff to pay the note to him, which it did under protest. Because of the fall in value of the mark, plaintiff was enabled to discharge this balance for much less than the money it had received, the difference being over $684,000. The Commissioner treated this sum as income for the year 1921 and assessed a tax thereon which was paid under duress and protest. Without this item, plaintiff's income tax return for the year showed no taxable income but a large deficit. Its claim for refund was rejected. Plaintiff contended that this was not income under the statute but that even if it were so regarded it was received in 1911, 1912, and 1913, and should not be included in the income of the year 1921.

Question: Does this item resulting from a decline in the value of German marks constitute taxable income?

Decision: The court said that if this item was not income, then it did not come within the provisions of the 16th Amendment and the attempt to tax it was unconstitutional. That amendment did not grant to Congress the power to tax incomes as it already had that power, but gave it power to provide such a tax without apportionment. The court gave a definition which it said had been given in many cases, namely, "Income may be defined as the gain derived from capital, labor or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." The item involved was not profit from the use of capital or labor nor a gain from the sale of capital assets. The only possible element of the definition upon which the Commissioner could have based his claim "is, therefore, the element of gain upon a conversion of capital assets. * * * Certainly there was no conversion of capital to bring the transaction in the case at bar within the intent of the five elements of the definition, for the reason that the capital after the transaction was exactly what it was before. All that happened as a result of the transaction was the payment of a debt. There was nothing severed from the capital that came into the taxpayer within the intent of the Supreme Court's holding in the Eisner case. There was nothing that the taxpayer had that was derived, received or drawn as an item or thing separated from the capital and that essential element of income resultant from the conversion of capital is non-existent in the case at bar."

The taxing power of Congress in this particular cannot exceed the authority of the 16th Amendment, which authorized a tax on incomes. So that any power exercised thereunder must be in regard to incomes.

After quoting section 213 (a) of the Revenue Act of 1921, the court said: "The provisions of section 213 are obviously broader than the language of the Sixteenth Amendment."

KING v. MULLINS

(U. S. Supreme Court, May 31, 1898)
(171 U. S. 404)

Record: Fourteenth Amendment and the Constitution of West Virginia. Ejectment to recover land. Judgment for defendant in U. S. Circuit Court for West Virginia. Writ of error. Affirmed.

Facts: In West Virginia, lands liable to taxation are forfeited to the State, and are sold upon the owner's neglect to comply with certain regulations. By various conveyances title vested in plaintiff. Defendant defends upon the ground that the land was forfeited to the State before plaintiff's grantor had title.

Question: Was the forfeiture to the State due process of law?

Decision: "Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature, apply equally to proceedings for the collection of public revenue by taxation. On the contrary it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character. * * * In Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 239, it was said that 'the process of taxation does not require the same kind of notice as is required in a suit at law or even in proceedings for taking private property under the power of eminent domain.' It involves no violation of due process of law when it is executed according to customary forms * * *."

KLEPPER v. CARTER, COLLECTOR

(U. S. Circuit Court of Appeals, Ninth Cir., February 7, 1923)
(286 Fed. 370)

Record: Sections 900 and 903, Revenue Act of 1918. Judgment for collector for war tax against Klepper, as manufacturer of automobiles. Writ of error. Affirmed.

Facts: Klepper was a retail dealer in automobiles. He would purchase a chassis from one concern and a body from

another, and then put the two together and sell the completed article. The other concerns paid the tax as to their manufactured products, and Klepper reimbursed them. The Collector demanded that he pay an additional war tax of 3 per cent as a manufacturer on the gross sales price of the completed article, with penalties for failure to file return, deducting the amount of tax reimbursed by Klepper to the concerns from which he purchased the parts.

Question: Is a person who purchases a chassis from one concern and a body from another, and then puts the two together and sells the completed automobile truck, a manufacturer?

Decision: "In our opinion Klepper was properly held to be a manufacturer or producer of automobile trucks. While he did not make any of the several parts, nevertheless, he bought the parts made by others and he sold a completed automobile truck."

KNIGHTS v. JACKSON

(U. S. Supreme Court, October 16, 1922)
(260 U. S. 12)

Record: Massachusetts Income Tax Act of 1919. In error to the Supreme Judicial Court of Massachusetts, dismissing a petition for mandamus, to prevent the respondent, as State treasurer, from paying over to the city and towns certain income taxes collected from the plaintiff, a taxpayer (237 Mass. 493). Affirmed.

Facts: Statutes directed the Treasurer to pay over to the cities and towns from the proceeds of an increase in the income tax for two years, a sum to reimburse them for increases of salaries of school teachers. The income tax was levied upon the excess over two thousand dollars per annum of income derived from professions and business.

Question: Did the Act impose a public charge upon a special class of property and persons not specially benefited by the services, and for that reason was it a taking of property without due process of law in violation of the Fourteenth Amendment?

Decision: "The Supreme Judicial Court, waiving questions of procedure, held that the income tax was a general tax; that the

proceeds of the tax became part of the general funds of the State, that these funds could be expended for education, and that there was no appropriation of such a character as to make the tax a special tax for a special purpose or use. The petition was dismissed.

"We see no reason for not accepting the views taken by the Supreme Judicial Court. The plaintiff in error asks us to connect the increase of the tax for two years by the Act of 1919, c. 324, with the reimbursement directed by c. 363, which he assails. This cannot be done; especially not for the purpose of attributing to the legislature an attempt to achieve by indirection a result supposed to be beyond its power. The reimbursement from the general funds of the Commonwealth was lawful, and to make it the funds must be provided. The fact that the end was contemplated, if it was, in this particular increase, is no more than was necessary in some form to bring about the result."

KNOX MOTORS CO. v. UNITED STATES

(U. S. Court of Claims, July 2, 1923)
(58 Ct. Cls. 722)

Record: Revenue Act of 1917. Suit to recover excise taxes paid under protest. Judgment for the plaintiff.

Facts: The plaintiff sold a number of automobiles to the French Republic under a contract calling for delivery to the buyer either alongside the ocean steamer at New York harbor or to a port on the Atlantic seaboard. It was further provided that the vehicles should be boxed for export as per instructions, and that the risk of loss or damage during transportation until actually delivered at New York harbor should be upon the seller. Accordingly plaintiff made the sales, received sale prices and shipped to New York harbor according to the contract.

Question: Were such sales subject to the excise tax under Section 600 of the Revenue Act of 1917?

Decision: The court held on the authority of Spalding & Bros. v. Edwards (262 U. S. 66) that the plaintiff was entitled to recover back taxes so paid, since it amounted to a tax laid on

exports, contrary to Article 1, Section 9 of the Constitution of the United States.

KOMADA & CO. v. UNITED STATES

(U. S. Supreme Court, January 3, 1910)
(215 U. S. 392)

Record: Tariff Act of July 24, 1897. Petitioner claimed an importation was subject to a lesser duty than that assessed. The Board of General Appraisers and the Circuit Court sustained the Collector. The Circuit Court of Appeals reversed the decision. On certiorari the Supreme Court reversed the latter decision, sustaining the ruling of the Collector.

Facts: This case involved the proper classification of a Japanese beverage known as "Sake" which was not named in the act, but Section 7 provided that an article not enumerated "shall pay the same rate of duty which is levied on the enumerated articles which it most resembles." The department held "Sake" similar to still wine, containing more than fourteen per cent of alcohol and assessed it accordingly.

Question: Was the departmental decision valid?

Decision: "We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. * * * And we have decided that the re-enactment by Congress without change, of a statute which had previously received long-continued executive construction is an adoption by Congress of such construction." The classification of the collector was sustained.

LANE TIMBER CO. v. HYNSON

(U. S. District Court, E. D. Louisiana, New Orleans D., April 19, 1924)
(299 Fed. 619)

Record: Suit to recover capital stock tax paid. Judgment for the defendant.

Facts: A tax of $112.00 was assessed and paid on the capital stock of the plaintiff. A penalty of $5.60 was also exacted. The

payments were under protest and a suit was brought for the recovery thereof, it being claimed that the corporation was not doing business in the year ending June 30, 1920. The corporation was organized for the purpose of buying and selling timber land. It still held a large quantity of such lands, which it was offering on the market through agents. It did no other business and had bought no timber land for some time, nor had it made any sales.

Question: Was the company doing business so that it was subject to the capital stock tax?

Decision: "I think, however, the corporation is doing business within the meaning of the law. It was organized for the purpose of buying and selling timber lands, and has not divested itself of that function. While the lands they hold are being offered by agents, the final consummation of the transaction will be in the corporation. In my opinion a corporation, within the meaning of the law, cannot be said to have ceased doing business when its corporate activities have not been transferred to some other company or individual, and the corporate existence is preserved for the purpose for which it was organized."

LEDERER, COLLECTOR, v. REAL ESTATE TITLE INS. & TRUST CO.

(U. S. Circuit Court of Appeals, 3rd Cir., Feb. 8, 1924)
(295 Fed. 672)

Record: War Revenue Act of 1914, Sec. 3, special tax on bankers. Action by the company against the Collector. Judgment for plaintiff (291 Fed. 265).

Facts: The company had been required to pay a tax on the full amount of its capital, surplus and undivided profits, without regard to their use in its five entirely separate departments of title insurance, trusts, safe deposit, real estate and banking. The statute provided that bankers shall pay a special tax of $1 for each $1,000 of capital used or employed, and that, in estimating capital, surplus and undivided profits shall be included.

Questions: (1) Should the former decision of the court (263 Fed. 667) be reversed, holding that the tax should be levied on that part of the capital only which was used in banking?

(2) Should the action of Congress in connection with the enactment of a bill requiring certain statements from the Treasury Department, together with such statements, be given a probative force to change the meaning of the words actually used in the statute?

Decision: (1) "We shall merely say that we have not been persuaded to recede from the position we took in that case (and in the companion case of Germantown Trust Company v. Lederer, 263 Fed. 672), later sustained in principle by the Supreme Court in Fidelity & Deposit Company v. United States, 259 U. S. 296, 302, * * *."

(2) In this case the Collector offered in evidence the agreed statement as to the "action of the Senate when the War Revenue Bill was before it requesting the Secretary of the Treasury to furnish an estimate of the amount of revenue the proposed law would raise and the action of the Secretary of the Treasury in reply, supplemented by an affidavit of an official of the Treasury Department that the figures contained in the Secretary's response were predicated upon a tax on the whole capital, surplus and undivided profits of bankers."

The decision states that the lower court committed no error in refusing to give the history of the legislation a probative force that would change the plain meaning of the words used in the statute.

LEDERER, COLLECTOR, v. STOCKTON

(U. S. Supreme Court, October 16, 1922)

(260 U. S. 3)

Record: Act of 1916 as amended by Act of 1917. On writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court in favor of the plaintiff in an action to recover taxes claimed to have been illegally collected. (266 Fed. 676, ante 307.) Affirmed.

Facts: A residuary estate was devised to the Pennsylvania Hospital, a charitable corporation, subject to the payment of certain annuities during specified lives. The trustee transferred

the whole residuary fund as a loan for fifteen years to the hospital. The hospital paid interest only sufficient to satisfy the administrative charges and the annuity. The trustee was assessed on the income of the residuary estate, under Section 2b of the Act of 1916.

Question: Was the income received by the corporation from this fund exempt?

Decision: "This residuary fund was vested in the hospital. * * * As the hospital is admitted to be a corporation whose income when received is exempted from taxation under Section 11 (a), we see no reason why the exemption should not be given effect under the circumstances. To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

LESLIE et al. v. BOWERS, COLLECTOR

(U. S. District Court, S. D. New York, September 22, 1923.)
(293 Fed. 822)

Record: Act of October 3, 1917. Action to recover excess profits taxes and penalties assessed against a partnership. The court denied a motion to dismiss.

Facts: The plaintiffs were the surviving members of a co-partnership which included one Cannon who controlled thirteen mills known as the Cannon Mills. Of the commissions received for acting as selling agents for these companies, 60% was first paid to Cannon, the partners sharing in the remainder. By a contract dated May 1, 1917, the partnership agreement was modified so that the co-partnership, while still acting as selling agent for all the mills as before, was to receive all the commissions from ten mills and make no charge against the other three, with which Cannon might make such arrangement as he saw fit, without any accountability to the firm therefor. He contracted with these three mills to pay certain commissions to members of his family. The commissions in 1917 paid by the three mills under these agreements amounted to $660,257.77. This amount was regarded by the Government as income of the firm and it assessed an addi-

tional tax of $396,151.66 on such amount. This tax with the added penalty amounted to $423,882.28, which was paid under protest. The firm brought this action to recover that sum.

Question: Were the commissions from the three mills income of the co-partnership?

Decision: Such commissions were not income of the co-partnership. It took nothing from the moneys paid the Cannon family and had no enforcible right against any of the three mills for its services. The co-partnership made no contract with the three mills or with the Cannon family. The 60% of the total commissions going to Cannon under the first agreement, while the co-partnership performed the service, apparently represented the consideration moving to him for making available a business which had been his. By the modified agreement Cannon gave up this 60% in consideration that the firm would give up its right to consider the income from the three mills as a part of its receipts. As under the modified agreement no member of the firm had any interest in the commissions from the three mills, these commissions cannot possibly be income of the firm.

LIBERTY MUTUAL INS. CO. v. JOHNSON SHIPYARDS CORPORATION

(U. S. District Court, S. D. New York, July 23, 1924)
(300 Fed. 952)

Record: Conservation suit in equity. Claim of the Government for priority of payment of taxes over payments to general creditors. Such priority allowed.

Facts: Receivers had been appointed in an ordinary conservation suit in equity and were ready to close the estate, there remaining a distribution of the proceeds of the assets. The Government had a claim for income and excess profits taxes for 1917 and capital stock taxes for certain years. The special master sustained the contention of the receivers that the Government's claim for taxes was not prior to the claims of the general creditors. Exceptions were filed and the matter brought before the court.

Question: Was the Government's claim for taxes entitled to priority of payment over the claims of general creditors?

Decision: The court said that taxes were not included in the common acceptation of the word "debts." "They are civil obligations, not personal conventions. * * * The power of taxation belongs to every independent sovereignty, and is, of necessity, essential to the support and maintenance of the Government. In the United States, the right is exercised concurrently by the several states and the Federal Government."

The Government was awarded priority of payment of its tax claims against the defendant.

LICENSE TAX CASES

(U. S. Supreme Court, December, 1866)
(5 Wall. 462)

Record: Act of June 30, 1864, and as amended by Act of July 13, 1866. Indictments for violation of the acts. The indictments were upheld in the United States Supreme Court.

Facts: One of the nine cases involved the business of retailing liquors in Massachusetts where it was prohibited by law, and the other eight concerned the business of lotteries, three being from New York and the others from New Jersey, where such business was prohibited by law. The Act of 1864 provided that no persons should engage in certain trades or businesses, including those of selling lottery tickets and retail dealing in liquors, until they obtained a "license" from the United States. The amendatory Act substituted "special tax" for "license." The indictment in each case charged the defendant with conducting the particular business in the respective State without first having obtained and paid for a license under the above named Internal Revenue Acts.

Questions: (1) Was the imposition of penalties for carrying on any business prohibited by the State laws, without payment for the license or special tax required by Congress, contrary to public policy?

(2) Did the license under the Act of 1864 and the amendatory acts convey to the licensee authority to carry on the licensed business within a State?

(3) Could the business for which the licenses were required, being prohibited by the laws of the State, be taxed by the National Government?

(4) Could the defendants, charged with carrying on business prohibited by the State laws without the license required by the Acts of Congress be convicted and condemned to pay the penalties imposed by those acts?

Decision: (1) The court held that Congress expresses what is public policy on any particular subject by its legislation thereon. "This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. * * * The legislature has thought fit, by enactments clear of all ambiguity, to impose penalties for unlicensed dealing in lottery tickets and in liquors. These enactments, so long as they stand unrepealed and unmodified, express the public policy in regard to the subjects of them. The proposition that they are contrary to public policy is therefore a contradiction in terms, or it is intended as a denial of their expediency or their propriety. If intended in the latter sense, the proposition is one of which courts can not take cognizance."

(2) "But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the Government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for nonpayment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law if he pays it." In another place the court said: "They [the licenses] are mere receipts for taxes." Later on the court pointed out that the Act expressly says that licenses if granted should not be considered to authorize any business within a state or territory which is prohibited by the laws thereof.

(3) The court said there was no force in the objection that the National Government could not tax a business in a State

where the business was prohibited, because the payment for the license gave no authority to conduct the business in the State where prohibited but the license was merely a receipt for taxes, and because the effect of the taxes and penalties was in harmony with the State laws in that they tended to discourage the business.

(4) Congress, in passing the Act of 1866, substituted, throughout, the term "special tax" for the word "license," and so removed any further miscomprehension that securing a license gave no authority to engage in an unlawful business in a State. The amendment, therefore, shows that the requirement of payment for licenses under the former laws was a mere form of special taxation. The defendants were subject to such special taxation and to the penalties for not paying for the licenses.

LILLEY BUILDING & LOAN CO. v. MILLER, COLLECTOR

(U. S. Circuit Court of Appeals, Sixth Cir., February 6, 1923)
(285 Fed. 1020)

Record: Act of 1918. Suit to recover corporate income taxes. From a judgment of the United States District Court, Southern District of Ohio, in favor of defendant (280 Fed. 143, ante 923), plaintiff appealed. Judgment affirmed. (Certiorari denied by Supreme Court, 262 U. S. 754.)

Facts: (The facts are fully stated in the brief of the decision in the District Court, ante 923.)

Question: Was plaintiff exempt from the tax by virtue of Section 231 (4) of the Act of 1918, which exempts "domestic building and loan associations and co-operative banks without capital stock organized and operated for mutual purposes and without profit"?

Decision: "District Judge Peck, in a considered opinion (280 Fed. 143), held plaintiff not exempt. We approve not only this conclusion, but the reasoning on which it is based."

LINCOLN CHEMICAL CO. v. EDWARDS, COLLECTOR

(U. S. Circuit Court of Appeals, Second Cir., February 5, 1923)
(289 Fed. 458)

Record: Act of 1917. Writ of error to the District Court, S. D. New York, which dismissed an action brought against the

collector for the recovery of excess profits taxes (272 Fed. 142. ante 310). Judgment affirmed.

Facts: Plaintiffs paid additional taxes under protest, and filed claim for refund. It calculated its capital upon the basis of Section 209 of the Act, which imposed a tax at the rate of 8% where there was no invested capital or no more than a nominal capital. The Commissioner assessed the tax under Section 210, which provides in exceptional cases for an assessment based on a comparison with representative concerns. Plaintiff had outstanding capital stock of $10,000, its assets consisting of cash estimated at from $7,000 to $11,000, together with a secret process for extracting theobromine, a valuable drug. The process had been acquired in 1909, at the time of organization, by the issue of $2,400 par value of capital stock. The corporation later entered into a license agreement with another company to use the process, receiving a royalty for the privilege. Over $19,000 had been borrowed and used in improving this process. The indebtedness was paid from earnings.

Question: Did the plaintiff have only a "nominal capital" invested in the business as the phrase is used in Section 209 of the Act?

Decision: Contention of the plaintiff was based upon the argument that the corporation originally had invested capital in the form of cash and tangible property paid in for stock and that this had all disappeared prior to the year 1917. Its only assets then were the secret process and cash representing profits of the previous year. As to the process it was not improved but incomplete at the time of its acquisition, when it had only a nominal cash value. Reliance is placed on Section 207 (a), which declares that intangible property bona fide purchased prior to March 3, 1917, with shares in the capital stock in an amount not to exceed 20 per centum of the total shares of the capital stock "shall be included in invested capital at a value not to exceed the actual cash value at the time of such purchase, and in case of issue of stock therefor not to exceed the par value of such stock."

"The fallacy of the argument is in the assumption that the limitation placed by Section 207 upon the amount at which intan-

gible property paid in for stock may be included in invested capital applies merely to the original investment and that subsequent improvements of such assets are to be disregarded.''

It also had on hand cash which it had acquired solely through the accumulation of earnings. In any event its surplus was substantial and cannot be considered as merely nominal.

LONG, COMMISSIONER, v. BRADFORD NORMAN et al.
(U. S. Circuit Court of Appeals, First Cir., May 15, 1923)
(289 Fed. 5)

Record: Massachusetts income tax law. Appeal from a decree of the District Court in favor of the plaintiffs, in a suit to restrain the State Commissioner from assessing and collecting income taxes. Decree reversed.

Facts: The plaintiffs were inhabitants of Rhode Island and were assessed income taxes as trustees of their father's estate, on account of income received by them during the year 1918. The assessment was made under General Laws of Massachusetts, 1921, Chapter 62, Section 10. Plaintiffs claimed that they were not subject to be assessed for taxes because of their nonresidence.

Question: Were plaintiffs entitled to an injunction?

Decision: An injunction will not be granted if the plaintiffs have a ''remedy at law as complete, practicable, and efficient as the remedy in equity, for the determination of their rights.''

The court found that Section 98 of Chapter 60 of the General Laws of Massachusetts, 1921, and other statutes, gave a complete and adequate remedy at law for the recovery of taxes illegally assessed and collected, and that the case presented no circumstances calling for equitable relief. Sec. 47, c. 113, Acts and Resolves of 1921, provides specifically for cases where the person ''claims a domicile without the commonwealth.''

LONG v. RASMUSSEN, COLLECTOR
(U. S. District Court, D. Montana, May 29, 1922)
(281 Fed. 236)

Record: Section 3224, Revised Statutes. Suit in equity to recover possession of property distrained by collector. Decree rendered for plaintiff.

Facts: Plaintiff alleged she owned and was entitled to possession of certain property distrained by the collector for distilled spirits taxes and penalties assessed against one Wise, and she seeks to enjoin a threatened sale and to recover possession.

Question: Can a suit in equity be maintained to recover possession of property distrained for taxation, which property is claimed to belong to plaintiff and not to the taxpayer?

Decision: Section 3224, Revised Statutes, which prohibits a suit for the purpose of restraining the assessment or collection of any tax, applies to taxpayers only. Being thus deprived of one remedy, they are given another, an action to recover after taxes paid and repayment denied by the Commissioner. "No procedure is prescribed for nontaxpayers, and no attempt is made to annul any of their rights and remedies * * *. With them Congress does not assume to deal * * *. The instant suit is not to restrain assessment or collection of taxes of Wise, but is to enjoin trespass upon property of plaintiff," against whom no assessment was made. Nor are the taxes assessed against the property. "This trial demonstrating that plaintiff owns and is entitled to possession of the property and that the defendant wrongfully seized it to make taxes owed by Wise, justice requires that the sale be enjoined and the possession restored to her."

LUDINGTON v. McCAUGHN, COLLECTOR

(U. S. District Court, E. D. Pennsylvania, June 14, 1923)
(290 Fed. 604)

Record: Section 202 of the Act of 1918. Action to recover an additional assessment of tax paid by plaintiff under protest. Judgment for defendant.

Facts: Plaintiff purchased certain securities prior to March 1, 1913, for $32,500.00 and sold them in 1919 for $3,866.91. The actual loss was $28,633.09. The selling price, however, was $33,-183.09 less than the market price of the securities on March 1, 1913. On his return the plaintiff claimed the larger amount as a loss but the Commissioner reduced the amount of the deduction to the actual loss and made an additional assessment of $3,094 against the plaintiff. The plaintiff relies upon the letter of Sec-

tion 202 of the Revenue Act of 1918 which provides: "Sec. 202 (a). That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be: (1) In the case of property acquired before March 1, 1913, the fair market value of such property as of that date; and (2) in the case of property acquired on or after that date, the cost thereof. * * *"

Question: Is the plaintiff entitled to determine his loss by the difference in amount of the sale value and March 1, 1913, value, or between the sale value and purchase price?

Decision: The value of property as of March 1, 1913, cannot be taken as the basis for determining a loss upon the sale of the property where the property was acquired prior to March 1, 1913, at a cost less than the March 1, 1913, value. The provision of Section 202 must be considered in relation to the Sixteenth Amendment. The grant of power extended only to taxation of actual income. The Act intended to tax only actual income, and Congress did not intend to impose a tax on a mere fictitious or paper profit, or to permit the deduction of a mere fictitious or paper loss. Only actual gains are taxed; only actual losses are deductible. Losses with reference to March 1, 1913, value, are to be determined the same as gains.

LYNCH v. ALWORTH-STEPHENS CO.

(U. S. Circuit Court of Appeals, 8th Cir., November 12, 1923)
(294 Fed. 190)

Record: Revenue Act of 1916, Section 12 (b), Second, (b). Action to recover income and excess profits tax for the year 1917. Judgment for claimant (278 Fed. 959, ante 835). Writ of error. Affirmed. (Certiorari granted, 264 U. S. 577.)

Facts: Alworth-Stephens Co., the original plaintiff, leased two mines for 50 years. In both cases it agreed to pay the royalty of 30 cents a ton for coal mined. It sublet both mines, in one case its lessee agreeing to pay 75 cents a ton for the coal mined, and in the other 60 cents a ton. This was before March 1, 1913, on which date the earth covering the coal had been removed and the tonnage and ore in the mines were known definitely. It was de-

termined that the ore would be exhausted in seven years from 1913, as it subsequently was. On March 1, 1913, and ever since, the fair market value of the mineral in place was at least 75 cents a ton. The allowance to plaintiff for depletion of its property interests was less than the fair market value of such interests as of March 1, 1913.

Question: Is the lessee of a mine entitled to a depletion deduction under the 1916 act?

Decision: The mine owners had the first and superior property right, not exceeding 30 cents per ton of the ore extracted. Plaintiff had the second property right, not exceeding 45 cents and 30 cents, respectively, per ton of the ore extracted from the two mines. Plaintiff's lessees had the third property right subject to the preceding rights. The property rights of the lessees "were as absolute, as indefeasible, as enforceable at law and in equity and more valuable than the property rights and interests of the owners * * *. Every ton of ore extracted and sold necessarily depleted at the time of such extraction and sale the property right of the original lessors in the Perkins mine 30 cents, depleted the property rights of the plaintiff therein 45 cents, and depleted the property rights of the plaintiff's lessees by the difference between 75 cents and the value in the mine of the ton so extracted and sold."

Section 12 (b), Second, (b), Revenue Act of 1916, is as follows: "In the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made." "There were two classes of corporations interested in mines: The owners of the fee titles to them, or the lessors thereof; and the lessees thereof. The Congressional grant of allowances for depletion in case of mines, by its general terms, included both classes and excepted neither from its benefits, and it is not the province of the courts to exclude either of them therefrom."

The case of Weiss v. Mohawk Mining Co., 264 Fed. 502 (ante 598), was cited, in which case it was held that the depletion allowance was restricted to lessors who were the fee owners of the

mines, excluding the lessees. The court, in that case, based its conclusion on the proposition that the question under consideration had been conclusively determined in United States v. Biwabic Mining Co., 247 U. S. 116 (ante 526), and "upon the position that the same allowance for depletion could not be lawfully twice made." But the court, in that case, said as to arguments that the allowance for depletion was not limited to the fee owners: "These contentions would deserve serious consideration, if the questions involved were open; but we cannot think that they are."

The court quotes from Von Baumbach v. Sargent Land Co., 242 U. S. 503, 524-525 (ante 590): "It may be admitted that a fair argument arises from equitable considerations that, owing to the nature of mining property, an allowance in assessing taxes upon income should be made for the removal of the ore deposits from time to time. Congress recognized this fact in passing the income tax section of the Tariff Act of 1913 * * * when it permitted 'a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, five per centum of the gross value at the mine of the output for the year for which the computation is made;' and in the Income Tax Law of September 8, 1916 * * * a reasonable allowance is made in the cases of mines for depletion thereof, 'not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made.' These provisions were not in the Act of 1909, and, as we have said, we think that Congress, in that act, used the term 'depreciation' in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation."

The Biwabik Mining case arose under the 1909 Law, and the decision was based on the same grounds as in the Sargent Land Co. case.

It was the intent of Congress, by the enactment of the 1916 statute, "in the case of mines, to grant to fee owner, lessor, lessee and other corporations, who were on March 1, 1913, the owners of valuable property rights and interests in mines, in reduction

of their respective gross incomes to ascertain their net taxable incomes, a reasonable allowance for the depletion of their property interests in the mines and in the ores therein by the extraction and sale of the ores in the respective years for which the computations and returns of their incomes should be made, not exceeding, in the aggregate, the market value of those property interests on March 1, 1913."

LYNCH v. CONGDON et al.

(U. S. Court of Appeals, Eighth Cir., August 5, 1924)
(Not yet reported)

Record: Estate Tax Act of 1916. Suit to recover part of estate tax paid. Judgment for plaintiffs. Affirmed on writ of error.

Facts: Plaintiff in error is executrix of the estate of Edward J. Lynch, a former collector. Defendants in error are executors of the will of Chester A. Congdon, who died November 21, 1916. In April, 1913, and in 1914, certain banks issued two certificates of deposit payable to the order of Congdon and his wife or either of them or the survivor. Both certificates were at all times in the possession of the wife. After the death of the husband, the wife, claiming to be the owner of the funds, collected said certificates of deposit from the banks. The Commissioner held the amounts evidenced by said certificates, principal and interest, to be a part of the estate of the deceased and added that amount to the gross estate. The tax thereon was paid by defendants in error under protest. Their application for refund having been denied, they brought this suit, the amount of the tax involved being over $11,000. The judgment finally rendered by the District Court was in favor of the executors, and the plaintiff in error brought this writ of error.

(The original decision in this case, rendered March 14, 1922, by the District Court, ante 865, was vacated and set aside by said court in October, 1922, in view of the decision of the Supreme Court in Shwab v. Doyle, 258 U. S. 529, ante 975. The court then held that the Congdon Trust constituted no part of the gross estate of decedent within the meaning of section 202 (b) of the

1916 Act, that the joint deposits constituted no part of the gross estate within the meaning of that section, and that sums paid for administration and like expenses were proper deductions. The validity of the trust was not determined, that issue not being before the court.)

Question: Did the money represented by these certificates of deposit, issued prior to the passage of the act, constitute a part of the gross estate of the decedent under the Act of 1916?

Decision: Plaintiff in error contended that this was not a question of transfer to the survivor, each depositor being the owner of the entire interest in the property during the joint lives, but merely a cessation of decedent's interest in the property, and that the husband had the entire interest therein, which ceased by reason of his death. The court said that consideration of this question was foreclosed by the decision in Shwab v. Doyle, 258 U. S. 529 (ante 975). The status of the wife and her rights in the joint deposit were fixed before passage of the act in question. The certificates were delivered to her at the time of issue and she retained possession thereof. "The arrangement gave her a present joint ownership of the funds represented by the certificates, and the right of sole ownership if she survived him."

As the act was not retrospective, the tax assessed and collected was invalid.

MADRIGAL et al. v. RAFFERTY, COLLECTOR, et al.

(Philippine Supreme Court, August 7, 1918)
(38 Phil. 414)

Record: Revenue Act of October 3, 1913. Suit for recovery of income tax paid. Judgment for defendants. Appeal. Affirmed.

Facts: Madrigal married Susana Paterno prior to January 1, 1914, under the provisions of law concerning conjugal partnerships. Madrigal filed a return of his income for 1914. Subsequently he claimed that this did not represent his income but the income of the conjugal partnership, one-half of which should be considered the income of his wife. After payment under protest and a claim for refund, this suit was brought by Madrigal and his wife. The

income was made up of (1) profits of Madrigal in his coal and shipping business; (2) profits of the wife in her embroidery business, and (3) profits of Madrigal in a pawn shop company. The dispute concerned the additional tax. The trial court found for the defendants.

Question: Should the income have been divided between the husband and the wife for the purposes of taxation?

Decision: The court said that a tax on income is not a tax on property. A regulation of the Treasury Department was quoted as to returns by a husband and wife, and then the court quoted from its prior decision that "'prior to the liquidation, the interest of the wife, and in case of her death, of her heirs, is an interest inchoate, a mere expectancy, which constitutes neither a legal nor an equitable estate, and does not ripen into title until there appears that there are assets in the community as a result of the liquidation and settlement.'"

"Susana Paterno, wife of Vicente Madrigal, has an inchoate right in the property of her husband, Vincente Madrigal, during the life of the conjugal partnership. She has an interest in the ultimate property rights and in the ultimate ownership of property acquired as income after such income has become capital. Susana Paterno has no absolute right to one-half the income of the conjugal partnership. Not being seized of a separate estate, Susana Paterno cannot make a separate return in order to receive the benefit of the exemption which would arise by reason of the additional tax. As she has no estate and income, actually and legally vested in her and entirely distinct from her husband's property, the income cannot properly be considered the separate income of the wife for the purposes of the additional tax. Moreover, the Income Tax Law does not look on the spouses as individual partners in an ordinary partnership. The husband and wife are only entitled to the exemption of $8,000, specifically granted by the law. The higher schedules of the additional tax directed at the incomes of the wealthy may not be partially defeated by reliance on provisions in our Civil Code dealing with the conjugal partnership and having no application to the Income Tax Law. The aims and purposes of the Income Tax Law must be given effect."

Then is quoted a letter from the Treasury Department overruling the opinion of the Attorney General of the Philippines, holding the tax properly assessed against a husband and wife, and stating: "The statute and the regulations promulgated in accordance therewith provide that each person of lawful age (not excused from so doing) having a net income of $3,000 or over for the taxable year shall make a return showing the facts; that from the net income so shown there shall be deducted $3,000 where the person making the return is a single person, or married and not living with consort, and $1,000 additional where the person making the return is married and living with consort; but that where the husband and wife both make returns (they living together), the amount of deduction from the aggregate of their several incomes shall not exceed $4,000.

"The only occasion for a wife making a return is where she has income from a sole and separate estate in excess of $3,000, or where the husband and wife neither separately have an income of $3,000, but together they have an income in excess of $4,000, in which latter event either the husband or wife may make the return but not both. In all instances the income of husband and wife whether from separate estates or not, is taken as a whole for the purpose of the normal tax. Where the wife has income from a separate estate and makes return thereof, or where her income is separately shown in the return made by her husband, while the incomes are added together for the purpose of the normal tax they are taken separately for the purpose of the additional tax."

"In connection with the decision above quoted, it is well to recall a few basic ideas. The Income Tax Law was drafted by the Congress of the United States and has been by the Congress extended to the Philippine Islands. Being thus a law of American origin and being peculiarly intricate in its provisions, the authoritative decision of the official who is charged with enforcing it has peculiar force for the Philippines. It has come to be a well-settled rule that great weight should be given to the construction placed upon a revenue law, whose meaning is doubtful, by the department charged with its execution."

The judgment against Madrigal and his wife was affirmed.

MAGOUN v. ILLINOIS TRUST AND SAVINGS BANK

(U. S. Supreme Court, April 25, 1898)
(170 U. S. 283)

Record: Illinois inheritance tax law. Suit in equity in U. S. Circuit Court against the bank to remove a cloud from the title to certain real estate and to enjoin the collection of a State inheritance tax. Suit dismissed. Appeal. Affirmed.

Facts: The real estate was left to plaintiff by the will of Torrence, deceased. The bill claimed the Illinois inheritance tax law to be unconstitutional. The answer submitted that question to the court. The act provided that property transferred by will or the intestate laws should be subject to a tax and the heirs, legatees, etc., should be liable for the payment thereof, the rates depending upon the relationship of the beneficiary to the deceased and the amount received by such beneficiary, with certain exemptions differing according to the relationship.

Question: Was the Illinois inheritance tax law unconstitutional as denying the equal protection of the law?

Decision: The court first gave a brief history of legacy and inheritance taxes in other States and countries. The decisions upholding their constitutionality were based on two propositions: "1. An inheritance tax is not one on property, but one on succession. 2. The right to take property by devise or descent is the creature of the law and not a natural right—a privilege and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation."

As to the contention that the statute denied the equal protection of the law the court said: "Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar

circumstances.' * * * In other words, the State may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. * * * And Mr. Justice Brewer, in Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, after a careful consideration of many cases said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' "

The court said that the Illinois statute divided beneficiaries into three main classes dependent upon lineal relationship, collateral relationship, strangers to the blood, etc. "The first and second cases, therefore, of the statute depend on substantial distinctions and their classifications are not arbitrary. Nor do the exemptions of the statute render its operation unequal within the meaning of the 14th Amendment. 'The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the law-making power wherever it has not in terms been taken away. To some extent it must exist always; for the selection of subjects of taxation is of itself an exemption of what is not selected.' "

As to strangers to the blood, the court said: "If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. * * * All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed and their legality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and the decree of the Circuit Court is affirmed."

MALLEY, COLLECTOR, v. OLD COLONY TRUST COMPANY

(U. S. Circuit Court of Appeals, First Cir., April 17, 1924)
(299 Fed. 523)

Record: War Revenue Act of October 22, 1914, Section 3, special tax on bankers. Suit to recover such a special tax. Judgment for plaintiff. Writ of error. Reversed and remanded.

Facts: The company was engaged in banking in Boston but had five other distinct lines of business. Its capital stock was $6,000,000, surplus $8,000,000, and undivided profits ranging from about $700,000 to about $1,350,000 for the years 1914 to 1916 inclusive. It paid under protest the special tax, levied on the aggregate of such capital, surplus and undivided profits and brought suit for the recovery of a portion thereof. The statute provides a tax of "$1 for each $1,000 of capital used or employed, and in estimating capital, surplus and undivided profits shall be included." By agreement, there was admitted in evidence, subject to plaintiff's objection that they were immaterial, a resolution of the Senate and a letter of the Secretary of the Treasury as they appeared in the Congressional Record, and an affidavit.

Questions: (1) Were the taxes illegally assessed upon the total capital stock, surplus, and undivided profits?

(2) Were the resolution, letter and affidavit relevant and material?

(3) What is liable to this tax?

Decision: (1) "We regard this question as settled by the United States Supreme Court in Fidelity & Deposit Co. v. United States, 259 U. S. 296, 302 [ante 887] where the Court discusses the contention there made that all the capital of the bank was subject to the tax and said at page 302:

" 'The Act of 1898 applies to individual bankers as well as to corporations. Surely Congress could not have intended to tax as capital employed in banking the whole net property of an individual banker. Yet the possession of large wealth would probably aid him in attracting depositors; and all his property would, if required, be available legally, and possibly in fact, to meet requirements of his banking business. That apportionment of the

capital of a company among its several departments can and should be made for purposes of taxation has been held by lower courts in cases arising under section 3 of the Act of Congress, October 22, 1914, c. 331, 38 Stat. 745, 750, which is substantially the same as the provision here in question. They recognize that the question whether the capital was used in the banking business, and if so to what extent, is a question of fact.' "

(2) The resolution, letter and affidavit were irrelevant and immaterial, the court referring to Real Estate Title, Insurance & Trust Co. v. Lederer, 263 Fed. 667.

(3) "By the Act a banker is defined as one—(a) 'Having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or (b) Where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or (c) Where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale.'

"If a corporation has a place of business where any business is transacted which falls under any one of these three classes, it is a banker and liable to a tax upon its capital, surplus and undivided profits to the extent that the same are 'used or employed' in banking.

"While it is only that part of the capital, surplus and undivided profits which is used or employed in banking that is subject to the tax, yet, in the case of a corporation which has only a banking department,—'where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order,' its entire capital stock, surplus and undivided profits are used or employed as security for its depositors, whom it serves to attract; and this is true whether this capital assumes the form of permanent investments, reserves or cash. Its assets could not be limited to those used in making loans or in other transactions. It is its capital which gives it standing in the financial world and brings it depositors; and it is all used and employed in banking.

"In Fidelity & Deposit Co. of Maryland v. United States, supra, the Court said at page 301:

"'Capital may be employed in banking although it is not used strictly as working capital and none of it is used in making loans or directly in other banking transactions. Money of a banker held in the vault or with depositaries as a reserve is employed in banking as much as money loaned to customers. Capital invested in securities may be employed in banking even if its sole use is to give to the banker the credit which attracts depositors or to make it possible for him otherwise to raise money with which banking operations are conducted. And if such securities serve to give credit, they will continue, also in the legal sense, to be capital used in the banking business, even if they are designated by the company as assets of another department and physically segregated as such.'"

"In the present case there was no evidence in regard to the extent of the business of the trust department of the plaintiff, nor was there any evidence introduced from which inferences might be fairly drawn in regard to the same. Without such evidence, as well as evidence of the assets in the savings department, it is impossible to determine what part of the capital of plaintiff (including capital, surplus and undivided profits) was employed in banking and what part in the savings and trust departments."

"So far as the plaintiff participated in 'underwriting syndicates' we think it was using its capital and this would constitute banking under the Act, but that a purchase of bonds for re-sale to its customers would not. Richmond v. Blake, 132 U. S. 592, 598.

"Without a determination of the total assets used by the plaintiff, the proportionate part of the same which the vaults, the real estate not used in banking and the bond department securities not so used represent, cannot be ascertained."

The judgment was reversed and the case remanded for further proceedings.

MARQUETTE, HOUGHTON & ONTONAGON R. CO. v. UNITED STATES

(U. S. Supreme Court, December 19, 1887)
(123 U. S. 722)

Record: Act of July 14, 1870. Action by the government to recover Internal Revenue tax. Judgment for plaintiff. Writ of error. Reversed.

Facts: The statute levied a tax "on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other fund." The railroad company's earnings were not divided but were used during the year in the construction of new works. The amount was never added to any fund but it was taken from the money in the Treasury to pay for the new structures and additions as they were made.

Question: Under the Act of July 14, 1870, was a railroad company liable to the tax on its profits, not divided, but used for construction during the year?

Decision: As the statute was "An Act to reduce Internal Revenue taxes, and for other purposes" its provisions should be construed in connection with like provisions in the preceding statutes. The Act of July 1, 1862, taxed a railroad company on all payments of interest on its bonded debt and on all dividends, and taxed banks, etc., on dividends and "on all sums added to their surplus or contingent funds." The act of June 30, 1864, taxed the dividends of banks, etc., as in the former act and "all undistributed sums, or sums made or added during the year to their surplus or contingent funds," and taxed railroad companies on interest on their bonded debt and on dividends to stockholders "as part of the earnings, profits, income, or gains of such company, and on all profits of such company carried to the account of any fund, *or used for construction.*" The court said: "When therefore, profits 'used for construction' were left out in the act of 1870, it is evident to our minds that congress intended to reduce the tax on railroad corporations to that extent. The question is not what would have been the meaning of 'profits carried to the account of any fund,' or 'added to any surplus, contingent,

or other fund,' if this special provision in respect to profits 'used for construction' had never been made, but what the meaning is with that provision left off after it had once been added. This is to be ascertained, not by inquiry into the manner of keeping railroad accounts, but by interpreting the language used by congress at different times to give expression to its will; not by determining whether, as matter of book-keeping, it is usual to carry undivided profits used for construction to a construction fund, but by studying the several statutes to see if it was intended that, if so used, they should be taxed under the act of 1870. In our opinion, it was not, and consequently the current earnings of the company for the year 1871, used as earned in new construction, were not taxable as profits of that year."

MARR v. UNITED STATES

(U. S. Court of Claims, November 21, 1923)
(58 Ct. Cls. 658)

Record: Revenue Act of 1916. Suit to recover amount paid as an additional income tax assessed in 1921 upon the return made for 1916. Judgment against plaintiff. (Pending in Supreme Court.)

Facts: In 1916 the plaintiff and his wife owned common and preferred stock of the General Motors Company, a New Jersey corporation having $15,000,000 common stock and $15,000,000 7 per cent preferred stock. This company in 1916 organized the General Motors Corporation under the laws of Delaware with an authorized capital of $82,600,000 of common and $20,000,000 of non-voting preferred stock. This was done under a reorganization plan by which the new corporation was to take over the assets of the old company and continue the latter's business. The new corporation thereupon acquired all the outstanding stock of the New Jersey company from the latter's stockholders by exchanging therefor shares of its own stock at the rate of five shares of common and one and one-third shares of preferred stock for shares of the old company, except that a few shares of preferred stock were bought for cash. The new corporation then acquired all the assets and liabilities of the old company and caused it to be dissolved. The plaintiff and his wife exchanged stock under the reorganiza-

tion plan. The difference between the market value of the stock of the Delaware corporation so received by the plaintiff together with $100 paid in cash, and the cost to him of the stock of the New Jersey corporation was $324,466.57. This sum was treated as income by the Government and an additional tax of $23,098.40 was assessed. Claims for abatement and refund were rejected and plaintiff paid the tax under protest.

Question: Did the plaintiff realize a taxable gain as a result of the reorganization?

Decision: "Plainly the transactions involved two distinct entities, organized under the laws of different States, with different powers, and with different capital. Plaintiff exchanged his stock in one of these entities for stock in the other. This was an exchange of property.

"When the exchange became effective we think that the plaintiff 'in a legal sense realized his gain.' "

MARSHALL v. NEW YORK

(U. S. Supreme Court, December 20, 1920)
(254 U. S. 380)

Record: Claim of New York for priority of its claim for license tax against a foreign corporation in receivership. Denied. Reversed in the Circuit Court of Appeals. Writ of certiorari. Affirmed.

Facts: The District Court had appointed a receiver for the All Package Grocery Stores Co., a Delaware corporation having a place of business and property in New York. The state claimed the right of priority of payment for certain franchise taxes and license fees for the privilege of doing business in the state.

Question: Was the state entitled to priority of payment as to state taxes?

Decision: The court decided that the state was entitled to such priority, that right not arising from an express lien on the assets existing at the time they passed into the receiver's hands. "The right of priority has been likened to an equitable lien. * * * The analogous preference in payment given to claims

for labor by state statutes, and to which the Bankruptcy Act gives priority, has been described as being 'tantamount' to a lien.''

MASON et al. v. SARGENT, COLLECTOR

(U. S. Supreme Court, March 6, 1882)

(104 U. S. 689)

Record: Acts of June 30, 1864, June 13, 1866 and July 14, 1870. Suit brought in a state court and removed to the United States court to recover a legacy tax paid. Judgment for defendant. Writ of error. Reversed.

Facts: William P. Mason died December 4, 1867. By his will the present property upon which this tax was levied was bequeathed to plaintiffs in trust for his widow for her life and upon her death one-half each to two children. The widow died June 17, 1872. In April, 1873, a tax was assessed and it was paid May 13, 1873, under protest. Claim for refund was rejected. Suit was brought. The statute provided that the tax ''shall be due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom,'' etc.

The Act of July 14, 1870, repealed this tax '' 'on and after the first day of October, eighteen hundred and seventy,' and by the 17th section of that Act, p. 261, it was enacted that 'All Acts and parts of Acts relating to the taxes herein repealed, and all the provisions of said Acts, shall continue in full force for levying and collecting all taxes assessed, or liable to be assessed, or accruing under the provisions of former Acts or drawbacks, the right to which has already accrued or which may hereafter accrue, under said Acts; and for maintaining and continuing liens, fines, penalties and forfeitures incurred under and by virtue thereof. And this Act shall not be construed to affect any act done, right accrued or penalty incurred under former Acts, but every such right is hereby saved.' ''

Question: Was the tax legally collected?

Decision: "The property or fund which is the subject of the legacy was expressly exempt from tax or duty, in the hands of the trustee, during the life of the testator's widow. It seems to us very plain that the trustee was not bound to make return of the legacy upon the schedule, list or statement specified in section 125 of the Act of 1864, until, by the death of the owner of the life estate, the legacy became payable to those entitled in remainder; for the delivery of that list or statement to the assessor is to be followed immediately by a delivery by the trustee of its duplicate to the collector, and the tax paid thereon to such collector; whereas, by the express terms of the section, as amended by the Act of 1866, the tax or duty becomes due and payable only when 'the party interested in such legacy, etc., shall become entitled to the possession or enjoyment thereof,' etc. * * * No right to the payment of the tax had accrued at the date when the repealing Act took effect; and, therefore, none to collect it can be deduced from its saving clauses."

MAYES, COLLECTOR, v. PAUL JONES & CO.

(U. S. Circuit Court of Appeals, Sixth Cir., January 7, 1921)
(270 Fed. 121)

Record: Revenue Act of October 3, 1917. Suit to recover taxes paid under protest. Judgment of the District Court for the Western District of Kentucky in favor of the plaintiff (265 Fed. 365). Affirmed.

Facts. The plaintiffs were assessed rectified spirits taxes under the provisions of Section 304 of the Act of October 3, 1917. The section imposed a tax on each gallon of distilled spirits thereafter rectified. Prior to the enactment of this Act the ruling of the revenue officers had been that the use of Karl Kiefer filter was not rectification.

Question: Did Congress by the Revenue Act of October 3, 1917, adopt the long-continued executive construction given to Section 3244, Revised Statutes, which was specifically referred to by the Act of October 3, 1917, and may the department afterward change that construction?

Decision: "It has been repeatedly held by the Supreme Court of the United States that, where the meaning of a statute is doubtful, the construction given by the Department charged with its execution, should be given great weight. * * * This rule of interpretation applies with full force to this case, for the reason that Section 304 of the Revenue Act of October 3, 1917, provides that the tax shall be levied only upon distilled spirits and mixtures produced in such manner that the person so rectifying, purifying, refining, or mixing the same is a rectifier within the meaning of Section 3224 R. S. Congress is presumed to have known the long-continued executive construction given to Section 3244 Revised Statutes, when it enacted the Revenue Act of October 3, 1917. It is also presumed to have known the rule of construction announced by the Supreme Court in United States v. Hermanos [209 U. S. 337] and United States v. Falk [204 U. S. 143]. * * * The conclusion follows that it intended to adopt this construction as fully and completely as if it had written it into the Act itself."

It was contended by the Government that it was not precluded from a change in construction. If there had been no later legislation, * * * the Treasury Department, in the absence of judicial interpretation, would be at liberty to make such change in prior construction * * * as would seem to it necessary to carry into effect the purpose and intent of the law; but if * * * Congress has adopted a long-continued executive construction * * *, the Treasury Department is no longer at liberty to change that construction."

McCOACH, COLLECTOR, v. PRATT et al.
(U. S. Supreme Court, March 1, 1915)
(236 U. S. 562)

Record: Acts of June 13, 1898, April 12, 1902, and June 27, 1902. Suit for the recovery of a legacy tax paid. Judgment for plaintiffs. Affirmed by the Circuit Court of Appeals. Writ of error. Affirmed.

Facts: Dreer died May 24, 1902. The creditors had a year within which to file their claims and the legatees were not entitled to demand their legacies until after that time, and then only in

the event there was a residue. On July 1, 1902, less than two months of the prescribed year had passed, and whether there would be a residue was undetermined. In July, 1903, the Collector demanded a tax, which was paid under protest. A claim for refund was rejected and suit was brought, the executors securing judgment, which was affirmed by the Circuit Court of Appeals. A writ of error was sued out. The Act of June 27, 1902, provided that where an executor had paid any tax upon a legacy under the provisions of the Act of June 13, 1898, the Secretary of the Treasury was authorized and directed to refund upon application so much "of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act * * * upon or in respect of any contingent beneficial interest which shall not become absolutely vested in the possession or enjoyment prior to said July first, nineteen hundred and two."

Question: Was this legacy subject to tax?

Decision: The court said that the word "vested" in the first sentence means the same as "absolutely vested in possession or enjoyment" in the second sentence in the statute, and that the words "contingent" and "absolutely vested in possession or enjoyment" were used antithetically. The only sense in which distributive shares are contingent "is that they come into being only where, in due course of administration, the debts of the deceased are ascertained and it is found that a surplus remains for distribution. It is in this sense that the word is applied to distributive shares, and, of course, it is applied to legacies in the same way."

The decision of the lower courts was affirmed, in which the refund of the succession tax had been directed.

McCRAY v. UNITED STATES

(U. S. Supreme Court, May 31, 1904)
(195 U. S. 27)

Record: Oleomargarine Act of 1886 as amended by Act of 1902. Suit by United States against McCray for a statutory

penalty of $50. Demurrer to answer sustained. Judgment for Government. On writ of error to the District Court of the United States for the Southern District of Ohio the judgment was affirmed in the Supreme Court.

Facts: McCray was a licensed retail dealer in oleomargarine. He had purchased for resale 50 pounds of oleomargarine, to which were affixed revenue stamps at the rate of one-fourth cent a pound which the law required for oleomargarine that was free of artificial coloration to make it look like butter, instead of stamps at the rate of ten cents per pound required for oleomargarine that was artificially colored to look like butter. The Government contended that the oleomargarine was artificially colored. McCray in his answer stated that it received its yellow color from having as one of its ingredients creamy butter which was artificially colored a deep yellow, and that this method of imparting a yellow color to oleomargarine was not artificial coloration within the meaning of the statute.

Questions: (1) Is oleomargarine artificially colored, when it has a yellow color like butter which is acquired from artificially colored butter used as an ingredient?

(2) May the motive of Congress, as, to destroy the manufacture of artificially colored oleomargarine, be inquired into to determine the constitutional exercise of its powers; i. e., may the judiciary check the abuse or unwise exercise by Congress of its lawful powers?

(3) Are artificially colored oleomargarine and artificially colored natural butter in substance and effect one and the same thing, so that to lay an excise tax only on oleomargarine that is artificially colored and not on butter so colored is violative of the due process clause of the Fifth Amendment?

(4) Is the tax, because so high as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, void because it thus deprives the manufacturer of that article of his freedom to engage in a lawful pursuit and so violates those fundamental rights which it is the duty of every free Government to safeguard?

Decision: (1) By the Act oleomargarine is subject to a tax of 10 cents a pound. But in the proviso of the section providing for this tax the Act says: "Provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound." Therefore, oleomargarine that contains artificial coloration that causes it to look like butter is not within that proviso and is subject to the ten-cent tax. The statute, said the court, does not make the imposition of one tax rate or the other dependent on the manner of imparting the artificial coloration; the imposition of one or the other rate depends only on whether the oleomargarine is or is not free of artificial coloration that causes it to look like butter of any shade of yellow.

(2) Relying on numerous cases, including Knowlton v. Moore, 178 U. S. 41 (ante 289), and Patton v. Brady, 184 U. S. 608 (post), the court held that it could not inquire into the motives of Congress to ascertain whether the purpose of the exercise of its lawful powers was to secure a result that was unwise, unjust, injurious or destructive. The general reason given was that to do so would be to destroy all distinction between the powers of the respective departments of the Government.

(3) Relying on Capital City Dairy Co. v. Ohio, 183 U. S. 238, and the authorities there cited, the court held that the distinction between the two products was so great as to justify the absolute prohibition of the manufacture of oleomargarine artificially colored to look like butter so that Congress in taxing one and not the other was not making an unreasonable discrimination in violation of the due process clause of the Fifth Amendment.

(4) Conceding that the tax tends to repress the manufacture of artificially colored oleomargarine; conceding further that there are fundamental rights which every free Government should safeguard and are, therefore, implied in the construction, or in any event, embraced within the protection of the due process clause of the Fifth Amendment; and granting also that it would be the duty of the judiciary to hold as void any perverted exercise of its lawful power by Congress which resulted in so great an abuse as to destroy fundamental rights; yet such concessions

(made merely for argument), the court said, are "not controlling in this case. This follows when the nature of oleomargarine artificially colored to look like butter is recalled. * * * It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it can not be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition upon the theory that to do so is essentially to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution."

McGUIRE v. WINSLOW et al.

(U. S. Circuit Court, N. D. New York, January 27, 1886)
(26 Fed. 304)

Record: Revised Statutes Sections 3074-3079. Action of trover to recover the value of a horse alleged to have been wrongfully seized for customs duties.

Facts: Plaintiff brought a horse from Canada into the United States. Defendant customs officer seized the horse on the ground that it had been brought in on a false invoice with intent to defraud the Government.

Question: Were the seizure and sale legal?

Decision: "It is entirely clear that a sale of seized property pursuant to these sections is, in legal effect and operation, equivalent to a sale under a judicial decree of condemnation. These provisions of law were adopted originally as a substitute for the ordinary judicial proceeding in a specified class of seizures. * * * They afford a reasonable notice by publication, etc."

The court decided that it was the duty of the officer to make the seizure if he had probable cause to believe the property forfeited and that when such a seizure is made no action of trespass or trover will lie in any common law tribunal until a final decree

is pronounced upon the proceedings *in rem* to enforce such forfeiture.

McMILLEN v. ANDERSON

(U. S. Supreme Court, October Term, 1877)

(95 U. S. 37)

Record: Fourteenth Amendment. Plaintiff secured temporary injunction against the sale of property seized by collector. On full hearing, judgment for defendant. Appeal to Louisiana Supreme Court. Affirmed. On writ of error the U. S. Supreme Court affirmed judgment of Louisiana Court.

Facts: The defendant, tax collector, seized property of plaintiff and was about to sell it to satisfy state taxes.

Question: Is the state law under which the collector acted opposed to the Fourteenth Amendment because the plaintiff was not present when the tax was assessed against him and because he was required to give security in advance when he sought to enjoin collection of taxes?

Decision: The law is constitutional. Collection as above, without suit, etc., is a legal proceeding for notice was given and ten days' time to pay it. "But, however that may be, it is quite certain that he can if he is wrongfully taxed, stay the proceedings for its collection by process of injunction. * * * A party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another."

MEISCHKE-SMITH et al. v. WARDELL, COLLECTOR, et al.

(U. S. Circuit Court of Appeals, Ninth Cir., February 12, 1923. Rehearing denied April 2, 1923)

(286 Fed. 785)

Record: Section 500 (d), Act of October 3, 1917. Plaintiffs' claim for refund of taxes paid for transportation of oil had been denied. They were nonsuited in the U. S. District Court (ante 938). Writ of error. Affirmed. (Certiorari denied October 8, 1923.)

Facts: Plaintiffs were trustees in dissolution of the Valley Pipe Line Company. Action was brought to recover taxes paid,

plaintiffs contending that the imposition of this tax was not authorized, as the tax is limited by the statute to public utility corporations, basing that claim upon the subtitle containing the taxing clause. The subtitle is "Title V" providing a "war tax on facilities furnished by public utilities." Plaintiffs contended that the Valley Pipe Line Company was a mere subsidiary corporation by which the Shell Company operated its own pipe line and was not a public utility.

"On the books of the Valley Pipe Line Company a monthly charge was made against the Shell Company of California for oil transported by its pipe line."

The Shell Company owned all the capital stock of the Valley Pipe Line Company, except the qualifying shares held by the directors of the latter company. The oil was transported from the oil fields of the California Oil Fields, Ltd., to the refinery of the Shell Company, 170 miles. The capital stock of these two companies was owned by another corporation.

The books of the Valley Pipe Line Company were kept in the offices of the Shell Company which made a book charge therefor of $2,500 a month. The Valley Pipe Line Company, however, had its own field organization and its own account in the bank. The vouchers from the field came into the office of the Sheel Company in San Francisco and were audited and passed on to officers of the Shell Company (who were also officers of the Valley Pipe Line Company) and were vised by the latter. The latter then signed checks therefor upon the account of the Valley Pipe Line Company. As the funds of the Valley Pipe Line Company in the bank would become depleted the fact would be called to the attention of the officers of the Valley Pipe Line Company who were also officers of the Shell Company and a sufficient amount to meet the requirements of the Valley Pipe Line Company would thereupon be deposited in its account by the Shell Company. These amounts would be carried into the books of the Valley Pipe Line Company as a credit to the Shell Company.

The books of the Valley Pipe Line Company, therefore, showed as charges against the Shell Company the amounts charged each month for transporting oil, and as credits

the amounts advanced by the Shell Company, also numerous little miscellaneous items.

Questions: (1) Were these transactions between the Shell Company and the Valley Pipe Line Company of such a character that they constituted under the War Revenue Act of October 3, 1917, the transactions of a single corporation, dealing with its own property in its own way?

(2) Is Section 500 (d) of the War Revenue Act of October 3, 1917, limited by its subtitle to the taxing of public utilities?

(3) Was the Valley Pipe Line Company subject to the tax imposed by this section?

(4) Is the tax law constitutional?

Decision: (1) "The real transaction was that of the Valley Pipe Line Company, confirmed by the entries made in the books of the company." The dominant and subsidiary corporations possessed separate and independent characters for the purposes of taxation.

(2) "We do not think it is necessary to resort to the subtitle of this statute for its correct interpretation. When the meaning of an act of Congress is ambiguous, resort may be had to the title, as well as to any other feature of the act, to remove such ambiguities; but when the intent is plain and the language of the statute clear and unambiguous, nothing is left to construction. * * * We think the taxing clause in this statute is perfectly plain and needs no construction to determine that it is no so limited."

(3) The Valley Pipe Line Company and the Shell Company were corporations organized under the laws of California. "We must presume, therefore, that the Valley Pipe Line Company constructed its pipe line from the oil fields of Coalinga to the refinery at Martinez, a distance of 170 miles, for the purpose of transporting oil as a common carrier under the provisions of the Public Utilities Act, and that the transportation here in question was so carried on, and this presumption is not overcome by the claim that the pipe line was engaged only in transporting oil for the Shell Company (owning all the stock of the Valley Pipe Line Company), and not for the public."

"But assuming that the Shell Company, by reason of its ownership of the stock of the Valley Pipe Line Company was in fact transporting oil for itself alone, then under Section 501 of the War Revenue Act we find that it was subject to a tax equivalent to the tax imposed by Section 500 of the Act."

(4) The tax is constitutional.

MEMPHIS & CHARLESTON R. CO. v. UNITED STATES

(U. S. Supreme Court, April 2, 1883)
(108 U. S. 228)

Record: Chapter 119, Act of 1862, taxing dividends and interest paid by a railroad company. Suit to recover income tax. Judgment for United States. Writ of error. Reversed in part.

Facts: Suit was brought to recover taxes upon dividends and interest declared and accrued between July 1, 1862, and December 1, 1865. Before the earlier date all of the railroad had come into the possession of the United States, but just before it took possession of the Western Division of the railroad the company's officers and rolling stock were moved south within the confederate lines by command of the confederate military authorities, and were kept there during the war. During this period the rolling stock was rented to other railroad companies. March 17, 1863, in the confederate lines, a dividend was declared payable in confederate treasury notes, the money therefor coming from said rentals. These dividends and certain interest were paid in confederate currency and the amounts thereof were reduced to their value in legal currency at the time when paid, before the tax was assessed.

After the war, certain dividends and accrued interest were satisfied by the giving by the company of its mortgage bonds.

A receipt was given under date of September 24, 1870, by the collector acknowledging receipt from the company of the balance of over $24,000 for penalty for neglect to make returns of interest on its bonds maturing from May, 1866, to July, 1869, "accepting proposition in compromise made to him" by the rail-

road company. At the trial, evidence of the company's understanding as to this receipt was offered in evidence but was excluded.

Questions: (1) Was the Company liable to tax upon the dividends distributing income earned from the use of the rolling stock within the confederate lines?

(2) Was the company liable to tax upon the dividends declared and interest accrued after the close of the war, the stockholders and bondholders receiving therefor mortgage bonds of the company, but with the option to receive cash?

(3) Did the receipt given effect a compromise between the Government and the railroad company and was evidence of the understanding by the company as to such receipt improperly excluded from evidence?

Decision: (1) "At the time when the dividend and interest now in question were paid, the entire railroad of the company and its two principal offices were within the lines of the military forces of the United States." The tax act was passed after the United States had taken possession. "The corporation was, therefore, subject to the actual governmental control of the United States, and the laws of the United States were both operative upon and enforcible against it. * * * The payments made in this case were for dividends to stockholders and interest to bondholders out of the earnings, income, and profits of the corporation in its business. By means of the dividend the surplus earnings were distributed to the stockholders, and the debts of the company were discharged to the extent of the interest paid. In this way the earnings on the inside of the confederate lines were made available to the corporation, which was subject to the actual control of the United States, and bound for the payment of all internal revenue taxes chargeable by law against it. To our minds it is a matter of no importance that the income came from property which was within confederate territory. The property, although within the confederate lines, belonged to the company, and the income derived from its use was actually paid

out by the company in dividends to stockholders, and to discharge the corporate debts for interest. * * * The tax is payable by the person because of his income, according to its amount, and without any reference to the way in which it was obtained.''

The verdict was for taxes on the value of the confederate treasury notes in legal currency and it would have been proper for the court to have directed a verdict such as the jury returned.

(2) Dividends declared and interest accrued after the war were not paid from earnings or income of the company. The lower court held that because the stockholder and bondholder had the option to receive cash it was equivalent to their receiving cash and re-investing, and therefore, such dividends and interest were taxable. ''In this, we think there was error. Although the tax is imposed on interest paid, the evident intention of congress was to tax only such payments as were either in fact or legal effect made from the income. * * * Under ordinary circumstances, it will be conclusively presumed that payments of interest were made from earnings, but when it appears that at the end of a civil war, during which interest had fallen in arrear, and earnings had been substantially suspended, the company, in reorganizing its affairs for future business, either funded its past-due coupons in a new issue of bonds, or paid them from the proceeds of the sales of new bonds, no such presumption can arise, and if the facts are established they will constitute a complete defense to a suit for the recovery of a tax charged on such payments of interest. Any other construction would be in violation of the whole spirit and purpose of the statute. The bondholder would undoubtedly be taxable for his income derived in that way, but the payment would not be one upon which the company could be taxed.''

(3) In all the correspondence ''and in the receipt given for the money when paid, reference was had only to the payments of interest maturing from May, 1866, to July, 1869.'' There was no error in excluding all testimony showing a different understanding on the part of the officers of the company.

MERCANTILE TRUST CO., GUARDIAN, et al. v. HELLMICH

(U. S. District Court, E. D. Missouri, 1923)
(Not reported)

Record: Revenue Act of 1918. Action to recover federal estate taxes paid. Demurrer to petition sustained.

Facts: Reyburn joined with his wife in a trust agreement conveying all his property to the plaintiff as trustee. The agreement provided for the payment of $750 a month to Reyburn for life. At his death one-sixth of the corpus and undistributed income went to the widow, there being a proviso that if during the life of Reyburn an annuity of at least one-sixth of the annual net income distributed had not been paid to the widow she should receive one-fourth of the corpus and undistributed income. All the rest of the estate, on the death of Reyburn, was to go to his heirs. He died about 1920, leaving a granddaughter, Tevis Reyburn, for whom the Mercantile Trust Co. is guardian.

Question: Did the incidental release of the dower right by the wife in joining in the trust agreement amount to a bona fide sale by her for a fair consideration in money or money's worth, so that what she took on the death of her husband should not be included in the taxable estate?

Decision: The tax was properly levied, as to the property held by the Mercantile Trust Company for its ward: "Clearly the property which came to Tevis Reyburn came to her only upon the death of the settler." The contention was made in behalf of the widow that "she ought to recover back the amount paid to defendant by her, because there was a bona fide sale for a fair consideration, in money or money's worth, to her. This proposition is bottomed upon the theory that when Florence Kelley Schill, as the wife of the settler, joined in the trust agreement, she inevitably conveyed away from herself all dower rights in the property, and in effect she took, by the provisions of that trust agreement, upon the death of her husband, the settler, other property, namely, a one-sixth interest in the estate, which was less than the statutory one-third, and that therefore the conveyance of her dower was in fact a bona fide sale to the trustee in

trust for a fair consideration, in money or money's worth, and that therefore she falls within the exception of the statute named.

"I think, however, that a fair reading of the trust agreement shows conclusively that Florence Kelley Schill benefited by the trust agreement; that she was helped and not hurt by the making of it. In short, that she took more, perforce its terms, than she would have taken had she not made it, and relied upon the provisions made for her by the Missouri statutes touching dower. That, however, will not necessarily settle the case. A further consideration comes in, and that is whether such a sale, such a conveyance of dower (which, it will be noted, happened only incidentally in this case) falls within the purview of that bona fide sale for a fair consideration in money mentioned in the exception contained in the statute. I am of the opinion that it does not. Florence Kelley Schill, while joining in the trust agreement with the settler, necessarily conveyed her dower interest, but such a conveyance, in my view, does not constitute a bona fide sale for a fair consideration in money. The language 'fair consideration in money' has been construed by various courts of the United States. The definition of the term, in my opinion, does not include a situation similar to that here presented.

"I think the demurrer ought to be sustained, and so it will be ordered."

MERRITT v. CAMERON

(U. S. Supreme Court, December 22, 1890)
(137 U. S. 542)

Record: Tariff Act. Suit to recover duties. Judgment for plaintiff. Reversed on writ of error.

Facts: The protest in this case was made more than ten days after the ascertainment and liquidation of the duties, but was made in accordance with the regulations of the Department.

Question: Is a Department regulation valid which is contrary to a statute?

Decision: "The ten days * * * begin to run upon such ascertainment and liquidation of the duties; and therefore, the protest in the case at bar was too late. * * *

"A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department has not been uniform."

METCALF et al. v. MITCHELL, COLLECTOR

(U. S. District Court, D. Massachusetts, May 21, 1924)
(299 Fed. 812)

Record: Suit to recover excess profits taxes paid under protest. Partial recovery adjudged. (Pending in Supreme Court.)

Facts: Plaintiffs were members of a firm of consulting engineers who advised various states and municipalities as to the installation of water works and sewerage systems. They were assessed $1,259.26 excess profits tax for the year 1917. The statute then in force excepted the compensation or fees received by them as officers and employees of the United States, of any state, etc. Plaintiffs contended that they were such officers or employees.

Question: Were plaintiffs exempt from taxation as officers or employees of the states, etc.?

Decision: The court said that "the officers or employees contemplated in the exception were regular employees of a state or subdivision thereof, and not persons whose services were made use of as consultants, and who were not in any sense a part of the regular force of such state or subdivision. * * * In two instances the plaintiffs were appointed regular officials of a subdivision of a state. Mr. Metcalf was chosen chief engineer of the Kennebec water district, which was established to provide a healthful water supply for the inhabitants of the district, and Mr. Eddy was a member of the board of engineers of the North Shore sanitary district of Illinois, appointed under an ordinance for the purpose of protecting the waters of Lake Michigan from con-

tamination. These two instances, in my opinion, come within the exception of the statute.''

While the provision of water for the extinction of fire is a public purpose, its provision for the general purposes of the inhabitants of the city is not a public purpose.

As to the tax rendered in connection with the service rendered for sewerage systems the court said: ''The provision of a system of sewers has been held to be so connected with the public health as to be part of the governmental function of a municipality. * * * But it is of the utmost importance that the power of taxation of the national government should not be unduly restricted. * * * And I am of the opinion that the taxing of the income of private persons, although arising from services rendered to a state, does not so seriously interfere with the governmental functions of the state as to be unconstitutional.'' The court said that states or public officials thereof cannot be taxed, while private persons, though rendering similar services, may be taxed. A partial recovery of the tax paid was ordered.

METROPOLITAN R. CO. v. SLACK, COLLECTOR

(U. S. Circuit Court. D. Massachusetts, May, 1874)
(Fed. Cas. 9506)

Record: Section 119, Act of June 30, 1864, as amended, and Section 15, Act of July 14, 1870. Action to recover income taxes paid. Judgment for defendant as to the first tax and judgment for the plaintiff as to the second.

Facts: June 23, 1870, the corporation declared a dividend of its income for the first six months of 1870, payable July 1, 1870. A tax of 5 per cent was assessed thereon. December 22, 1870, the corporation declared a dividend of its income for the last six months of 1870, payable December 30, 1871. A tax of 2½ per cent was assessed thereon and a like tax for the surplus earnings of the corporation. This suit is to recover these taxes, which were paid under protest.

Questions: (1) Was the tax on the dividend declared in June, 1870, recoverable as assessed under the Act of June 30, 1864?

(2) Did the Act of July 14, 1870, impose tax on the earnings of a railroad corporation for the second half of 1870?

Decision: (1) The Act of 1864, as amended in 1866, brought the income tax thereby imposed to a close with the end of the year 1869. The tax upon earnings of such companies as the plaintiff was an excise imposed upon them directly and not an income tax. Therefore, this part of the case was decided for the defendant, the limitation in the Act of 1864 not applying.

(2) "The question concerning the tax on the earnings of the second half of the year 1870 is one of difficulty, because section 15 of the Act of 14th July, 1870, * * * appears to be self-contradictory. It provides that there shall be levied and collected 'for and during the year 1870' a tax of 2½ per cent on the amount of all interest or coupons paid, etc., and on the amount of all dividends of earnings, income or gains 'hereafter declared' by any bank, etc." The court said that unless the statute were changed by interpolating the words "for the remainder of the year 1870," or something equivalent "it is plain that Congress has failed to authorize a levy for the last months of 1870, whatever it may have said about dividends in some other clause." Judgment for plaintiff was therefore rendered as to this part of the case.

MILES, COLLECTOR, v. CURLEY et al.

(U. S. Circuit Court of Appeals, Fourth Cir., July 3, 1923)
(291 Fed. 761)

Record: Revenue Act of 1916 as amended by the Act of March 3, 1917. Action to recover federal estate taxes paid under protest. Judgment in the District Court in favor of the plaintiff (276 Fed. 845, ante 873). Writ of error. Judgment affirmed.

Facts: The executors claimed a deduction from the total taxable estate, of $48,759.44, paid to the State of Maryland as an estate tax.

Question: Does the Maryland collateral inheritance tax attach to an estate before distribution so as to permit its deduction in assessing the federal estate tax?

Decision: It appeared that no decision had been really made by the Court of Appeals of Maryland as to whether the Maryland tax is a legacy tax or an estate tax. The State of Maryland, in substance and effect, adopted the Pennsylvania collateral inheritance tax. "In the case of Jackson v. Myers, 257 Pa. 104 * * * the Supreme Court of Pennsylvania decided that the collateral inheritance tax of Pennsylvania is not levied upon the inheritance or legacy, but upon the estate of the decedent, holding that what passes to the legatee is simply the portion of the estate remaining after the State has been satisfied by receiving the tax. * * * The question presented herein, for decision, was directly presented to the Circuit Court of Appeals of the Third Circuit in the case of Lederer v. Northern Trust Company [262 Fed. 52, ante 376], and that case held that under the Pennsylvania statute, and the decisions of the court of last resort in the State of Pennsylvania, such tax was an estate tax, and not a legacy tax, and that the plaintiff therein should recover from the collector the amount so paid under protest."

"Upon the authority of that case, and under all the circumstances and conditions surrounding this case, we hold that the proper construction of the collateral inheritance statute of Maryland, makes such tax an estate tax, and not a legacy tax, and therefore, the judgment below is affirmed."

MILLS WOVEN CARTRIDGE BELT CO. v. MALLEY, COLLECTOR

(U. S. Circuit Court of Appeals, First Cir., February 13, 1923)
(286 Fed. 841)

Record: Revenue Acts of 1916 and 1917. Suit for recovery of taxes. Judgment of District Court for the District of Massachusetts in favor of the defendant (ante 948), affirmed.

Facts: Plaintiff sought to recover taxes paid under protest for the years 1916 and 1917, assessed upon net profits derived by plaintiff from the manufacture and sale of machine gun belts.

Questions: (1) Was Section 214 of the Act of October 3, 1917, an unqualified repeal of the prior act so that no such munitions tax could be levied subsequent to January 1, 1918?

(2) Were the machine gun belts, as matter of law or as matter of mixed fact and law, parts or appendages of machine guns, within the meaning of Section 301 (1) of the Act of September 8, 1916?

Decision: (1) "By the Revenue Act of October 3, 1917, Congress changed the tax in two respects; by reducing the rate from 12½% to 10% for the year 1917, and by cutting off the tax entirely at the end of 1917. The applicable provision of the Act of 1916 was not repealed. It was amended."

(2) Whether the question as to whether belts were appendages to the machine gun or parts thereof, was a question of fact or one of law, the verdict of the jury in the affirmative was right as a matter of law. "While it is physically possible to load a machine gun by hand with a single round, the gun cannot function as a rapid-firing machine gun except through use of the gun belt. Without the belt, the gun cannot be operated as a machine gun."

MISSOURI RIVER, F. S. & G. R. CO. v. UNITED STATES
(U. S. Circuit Court, W. D. Missouri, W. D., January, 1884)
(19 Fed. 66)

Record: Act of July 14, 1870. Suit by United States in the court below for income taxes on earnings of railroad company for the year 1870. The lower court gave judgment for the Government for the whole amount claimed. Writ of error. Reversed, with directions that the amount of the judgment be reduced by the overpayment of other taxes.

Facts: It was insisted that the express terms of the Act of July 14, 1870, failed to tax corporations for the last five months of the year 1870, although individuals were taxed during that time. The agreed statement of facts in the case showed that the railroad company had overpaid other taxes for that year. The United States disregarded that and sued for the whole amount without any allowance therefor. The company did not plead the offset.

Questions: (1) Did the Act tax earnings of corporations for the last five months of 1870?

(2) Should the company be allowed, as against the tax, the amount of its overpayment of tax, not having pleaded the same?

Decision: (1) The court said that the Supreme Court, in Blake v. National Bank, 23 Wall. 307 (ante), had decided that the statute levied the tax upon corporations for the period in question.

(2) The Government had agreed upon a statement of facts which became the only evidence in the case. That statement showed an overpayment of other taxes, and while the Government did not expressly agree to credit that sum upon its remaining claim, it did, in effect, agree that the court should determine, from the facts stated, what sum, if any, was due. The Government "is entitled to the amount of tax due, less whatever sum has been paid. Nor is it necessary that the company should plead an offset. The Government is bound to prove the amount due, and if in making proof it shows affirmatively that it has received into its Treasury a partial payment, the court will take that fact into account."

MOBILE & OHIO R. CO. et al. v. TENNESSEE et al.

(U. S. Supreme Court, May 14, 1894)
(153 U. S. 486)

Record: Tax exemption clause in a corporation charter. Suit to collect State tax. The State Supreme Court gave judgment for plaintiff. Writ of error. Reversed and remanded.

Facts: The State and certain counties filed their bill against the company for taxes upon its property. The defense was that the revenue statutes of the State enacted subsequent to the granting of the company's charter impaired the obligation of the contract contained therein. The company was chartered in 1848. The State reserved no right to amend the charter and there was no constitutional or other provision reserving such a right. The charter provided that the company's capital stock should be forever exempt from taxation; that its property should be exempt for twenty-five years, and that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent. No dividends had been paid, and its earnings for the

years 1885 to 1889, inclusive, were insufficient for a dividend. The State Supreme Court denied the tax for 1885 and 1886, because the twenty-five years mentioned had not expired, but allowed the taxes for 1887, 1888 and 1889, stating that after the expiration of said twenty-five years all of the property of the company became liable to taxation under the rule of equality and uniformity prescribed by the State constitution, and that the clause in the charter as to the eight per cent dividends was void as in violation of said constitution.

Question: Did the charter provision constitute a contract which would be violated by further taxation, and what is the meaning of the word "dividends"?

Decision: The court said that the decision of the State court holding that, as a matter of construction, a charter provision does not constitute a contract, was not binding on the United States Supreme Court. The clause of the charter "that 'no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent,' is clearly not so incapable of any reasonable construction as to be void. On the contrary, its terms are plain and unambiguous. The only matter involving construction or interpretation is the meaning to be attached to the term 'dividend.' It admits of no question that the word 'dividend' mentioned therein has reference to dividends on the capital stock of the company held and owned by its shareholders. The term 'dividend' in its technical as well as in its ordinary acceptation means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders."

"Again, dividends can be rightfully paid only out of profits. Corporations are liable to be enjoined by shareholders or creditors from making a distribution in dividends of its capital. * * *

"The term 'profits,' out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans. * * *"

"It must be assumed that the legislature of Tennessee used the term 'dividends' in the exemption clause under consideration in the general sense indicated, and had reference to that portion of the net earnings of the company which legitimately constituted profits and could be rightfully apportioned or distributed among shareholders. There is no difficulty in ascertaining the amount of such profits in any year, and the stock actually issued being fixed it is hard to understand how it could be held that the exemption clause was void and unenforceable for want of certainty."

It is conceded by counsel and well settled by decisions of Tennessee and of the United States that the State legislature had the power to grant corporations exemption from taxation and that the legislature was not required to tax all property in the State. The charter clause in regard to dividends was "clearly a stipulation on the part of the legislature to forego the exertion of its taxing power to the extent of allowing the corporation to pay its shareholders eight per cent dividends from the net earnings of the company. The manifest object of the clause was to invite and encourage the investment of private capital in the enterprise of building the road. By the previous clauses of the section the capital stock was exempt from taxation forever, and the road, with all its fixtures and franchises, was exempt for the period of twenty-five years from its completion. These exemptions were primarily for the benefit of the corporation. The shares of stock were subject to taxation against the owners or holders thereof, and this last clause was clearly intended for their benefit to the extent of securing, as far as an immunity from taxation would do so, any reduction of dividends on their stock below eight per cent per annum."

"Our conclusion upon the whole case, which has received careful consideration, is that the decree of the supreme court of the State declaring the exemption clause of the company's charter void and holding the statutes of the State, under which the taxes sought to be collected were levied, to be valid and constitutional, was erroneous."

MONROE CIDER VINEGAR & FRUIT CO. v. RIORDAN, COLLECTOR

(U. S. Circuit Court of Appeals, Second Cir., February 20, 1922)
(280 Fed. 624)

Record: Revenue Act of 1918. Suit to recover taxes paid under protest. Judgment for the defendant in the District Court of the United States for the Western District of New York (274 Fed. 736) reversed.

Facts: The plaintiff was engaged in the sale of sweet cider, and in the month of November, 1920, sold 290 barrels for $3,862.17. The plaintiff under protest paid to the collector $386.22 beverage taxes claimed to be due under Section 628 of the Revenue Act of 1918.

Questions: (1) Was the sale of sweet cider taxable under this section?

(2) What was the effect of the regulation that the term "other soft drinks" in the statute included cider?

Decision: (1) The court held that the Act did not impose a tax on sweet cider, in view of the fact that all of the drinks mentioned specifically in the section were artificial preparations except grape juice, and the words "other soft drinks" were held to apply to other artificial preparations similar to those mentioned and not to sweet cider, which was not the subject of sale principally by manufacturers. Under the statute, pure apple cider would come under the classification of still drinks.

(2) Where a department is empowered to make regulations, its regulations, if not inconsistent with the statute, have the force of law, but it "cannot write into a statute something which is not there." This regulation "must therefore be laid aside without further consideration."

MOORE v. MILLER

(Court of Appeals, District of Columbia, February 15, 1895)
(5 App. D. C. 413)

Record: Sections 27 and 28, Act of 1894, and Article I, Section 8, Constitution of United States. Bill to enjoin Commis-

sioner from collecting income taxes. Bill dismissed. Affirmed on appeal.

Facts: Plaintiff alleged he was a shareholder in several corporations; that such corporations were required to pay a tax of 2% on their net earnings; that plaintiff had an income other than that derived from dividends of over $4,000; that the Commissioner threatened to collect from him 2% on the excess of his income, including said dividends, over $4,000; that this would deny him the equal protection of the law in that other persons receiving a like income of less than $4,000 would be entirely exempt from taxation; that the statute taxed the resident aliens on income in excess of $4,000, though said income was received from property located outside the United States; that no exception is made in said statute in the case of corporations created, owned and operated by the several states as agencies of their Government, which corporations, being agencies of said states are not subject to taxation by the United States; that the act is invalid because it provides for the assessment of earnings received prior to the passage of the act; and if the tax were collected, he would be without adequate remedy at law. Plaintiff prayed injunction. A demurrer was interposed. The bill was dismissed.

Question: Is the act unconstitutional?

Decision: The court said it did not perceive "that there is any good ground or cause shown for an injunction to restrain the Commissioner of Internal Revenue from proceding with the work of his bureaeu in respect to the assessment and collection of the income tax, under the Act of Congress of 1894."

MURRAY'S LESSEE v. HOBOKEN LAND & IMPROVEMENT CO.

(U. S. Supreme Court, December Term, 1855)
(18 How. 272)

Record: Act of May 15, 1820. On certificate of division of opinion from the U. S. Circuit Court for New Jersey.

Facts: In ejectment both parties claimed title; the plaintiffs claimed under execution of levy on a judgment, and the defendants under a sale by virtue of a distress warrant issued by the

solicitor of the treasury for an amount found due the United States from a collector of customs on an audit of his accounts, the Government's claims having become a lien on the land before the said judgment was recovered.

Question: Were the warrant of distress and the proceedings thereon under which the defendants claim title sufficient under the Constitution of the United States to pass and transfer the title?

Decision: "It must be admitted that, if the auditing of this account, and the ascertaining of its balance, and the issuing of this process (by the Solicitor of the Treasury), was an exercise of a judicial power of the United States, the proceeding was void."

"Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law when applied to the ascertainment and recovery of balances due to the government from a collector of customs * * *. For, though 'due process of law' generally implies actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings * * * yet, this is not universally true."

MUTUAL BENEFIT LIFE INS. CO. v. DUFFY, COLLECTOR

(U. S. District Court, D. New Jersey, February 19, 1924)
(295 Fed. 881)

Record: Revenue Act of October 3, 1917. Suit to recover war excess profits tax for 1917 paid. Motion to strike out amended complaint was denied and judgment was given for plaintiff.

Facts: The taxes amounted to over $83,000. Plaintiff is a mutual company, having no capital stock or stockholders. Its policy holders are its members, and they elect from among themselves the directors. Its assets consist solely of premiums and the investment thereof with the income therefrom. A legal reserve is required to be set aside and held to maintain the insur-

ance. Each year the excess, over disbursements and the requirements for the legal reserve, etc., is returned to the policy holders as a dividend or credited upon the next annual premiums. The laws of the states where it operates require that its assets shall be equal to such reserve. There is no special, segregated fund therefor. It filed its return and paid an income tax for 1917. It also filed an excess profits tax return for that year, showing no tax payable, declaring its invested capital to be $202,685.846.45, which included its legal reserve of $186,258,796. The Commissioner amended the return, deducting this reserve from the invested capital, and imposed the excess profits taxes sought to be recovered in this suit.

Question: Was the legal reserve of the company a part of its invested capital?

Decision: "The Government contends that the legal reserve of a mutual insurance company cannot be its invested capital, because it does not belong to it, but to the policy holders; that such fund is in the nature of a trust fund, and is in fact a liability, and not an asset. For some purposes this reserve is a liability, or a trust fund; but so is the capital subscribed by shareholders in a stock corporation. Both are treated as a liability in balancing assets and liabilities. * * * An examination of the returns made by the plaintiff for the years 1911 to 1917, inclusive, for Federal income tax purposes, discloses that while both its gross income and expenditures steadily increased, the increases were quite conservative, the average increase from 1913 being less than 7 per cent. The return for 1918, on the contrary, shows that, while the gross income increased at about the same rate, the increase in expenses and losses over 1917 exceeded 12 per cent. * * *

"Under other titles of this act the rate of the ordinary income tax was considerably increased, but, under title 2, Congress reached out for and taxed only such income as represented excessive profits. * * *

"Mutual insurance companies are not in business or trade in the ordinary acceptation of these terms. They are distributors, not producers, of wealth. Their business is, as stated, to insure

their members at cost. In this business some gains are planned and expected, but only to reduce the cost of insurance. To this end the premiums—the only primary source of revenue—are purposely made larger than the calculated bare cost of insurance. This excess is invested and the income thereof compounded. Whatever the gains, they are distributed, not as dividends in the ordinary sense, but to reduce the cost of insurance to the members. Gains of that kind, even if they exceed anticipation, are not of the character sought by the tax acts under consideration. * * *

"To tax the income derived largely from an invested fund and deny that the fund is invested capital is neither logical nor consistent, and such a result should not be allowed, unless the statutory definition permits of no other course. * * *

"In my opinion, the plaintiff, at the beginning of the year 1917, had invested capital, within the meaning of the Revenue Act of October 3, 1917, exceeding the sum of $25,500,000. As it is conceded that, if such capital reached that sum, no war excess profits tax was due from the plaintiff for the year 1917, the motion to dismiss the plaintiff's complaint must be denied, and, under the stipulation between the parties, the plaintiff is entitled to judgment for the amount claimed."

NATIONAL LEAD CO. v. UNITED STATES

(U. S. Supreme Court, March 1, 1920)
(252 U. S. 140)

Record: Suit in the Court of Claims to recover the difference between the amount of a certain drawback and duties paid. Judgment for the Government. Appeal. Affirmed.

Facts: The law providing for the drawback in question differed in form of expression from time to time, but since the Act of August 5, 1861, did not differ in substance from the Act effective August 27, 1894. Appellant claimed that the correct construction of the section relied upon requires that the drawback should be computed on the basis of the weights of the oil and oil-cake derived by the process of manufacture from the seed,

instead of on the basis of the values of the two products, as computed by the Government under its regulations.

Question: Is the departmental regulation a valid interpretation of the statute?

Decision: The act provides that where imported materials are used in this country in the manufacture of articles which are exported, a drawback shall be allowed "equal in amount to the duties paid on the material used" less one per centum. The court referred to the difficulty of applying this statute in cases where two or more kinds of manufactured products are derived from one dutiable material. For some time "it has been the settled law that when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect, especially where such construction has been long continued, as it was in this case for almost forty years before the petition was filed. * * *

"To this we must add that the department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed, particularly as applied to linseed and its products."

"The drawback provision, under which the construction complained of originated, continued unchanged from 1861 until the revision of the statute in 1870, and the Court of Claims finds that the rule for determining the drawback on oil cake was applied during the whole of that period of almost ten years * * *. The re-enacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute * * * for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government."

NATIONAL PAPER & TYPE CO. v. EDWARDS, COLLECTOR

(U. S. District Court, S. D. New York, May 26, 1923)
(292 Fed. 633)

Record: Revenue Act of 1918. Suit to recover income and excess profits taxes paid under protest. Judgment for the defendant.

Facts: Plaintiff was engaged in the business of exporting goods from the United States and of selling such goods in foreign countries. The total gross business of the plaintiff for the fiscal year ending March 31, 1919, was $6,435,512.69, of which amount $6,295,165.87 were sales of goods by the plaintiff in foreign countries after the goods had been exported there, and $158,346.82 were sales to export commission merchants in this country with the purpose that the goods should be exported and with the result that the goods were actually exported.

Question: Are the taxes assessed against such income invalid (a) because such taxes are upon exports in violation of article 1, section 9, clause 5 of the Constitution, and (b) because the taxes are unequal, discriminating and unfair by reason of the fact that the income of foreign corporations engaged in exporting goods from the United States is not subject to tax under similar circumstances?

Decision: "In the light of the decision in Peck & Co. v. Lowe, collector, 247 U. S. 165 [ante 396] * * * in which the Supreme Court held, under the income law of 1913, that income of domestic corporations derived from the business of export was within the taxing power of Congress and was not in violation of article 1, section 9, clause 5 of the Constitution, plaintiff in its brief has abandoned its attack on these taxes as in violation of this provision of the constitution. It now concentrates its attack upon the law on the ground that as interpreted by the Attorney General (32 Op. Attys. Gen. 336), and as enforced by the Treasury, it deprives the plaintiff of property without due process of law in violation of the Fifth Amendment, because it imposes upon the plaintiff's business discriminatory and unequal burdens which are not imposed upon foreign corporations similarly situated."

"Clearly, however, such a handicap or discrimination does not make the classification such a grave abuse or oppression as to condemn the law as a denial of due process within the Fifth Amendment. For to bring it within this condemnation it must be as the Supreme Court says in Brushaber v. Union Pacific R. R. Co. [ante 107], 240 U. S., 1, 24, 25 * * *:

" 'A case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property.' "

NATIONAL PAPER & TYPE CO. v. EDWARDS, COLLECTOR

(U. S. District Court, S. D. New York, June 1, 1923)
(292 Fed. 635)

Record: Revenue Acts of 1916 and 1918, imposing capital stock tax, and Constitution, article 1, section 9, clause 5. Suit for recovery of taxes. Defendant's motion for judgment on the pleadings was granted. (Pending in Supreme Court.)

Facts: Plaintiff was engaged exclusively in the exportation of goods and the sale of goods to export commission merchants to be exported, which goods were in fact exported. A capital stock tax was imposed under the 1916 and 1918 statutes.

Question: Is the capital stock tax under the Acts of 1916 and 1918 as applied to a corporation engaged in the exporting business a tax on exports prohibited by article 1, section 9, clause 5 of the Constitution?

Decision: "The tax in question is in form an excise tax on the privilege of doing business as a corporation, measured by the fair average value of the capital stock of the corporaton for the preceding year."

The court quotes from Peck & Co. v. Lowe, 247 U. S. 165 (ante 396). "So if the prohibitory clause invoked by the plaintiff be not in the way, Congress undoubtedly has power to lay and collect such a tax as is here in question. That clause says, 'No

tax or duty shall be laid on articles exported from any State.' Of course it qualifies and restricts the power to tax as broadly conferred. But to what extent? The decisions of this court answer that it excepts from the range of that power articles in course of exportation, Turpin v. Burgess, 117 U. S. 504, 507; the act or occupation of exporting, Brown v. Maryland, 12 Wheat. 419, 445; bills of lading for articles being exported, Fairbank v. United States, 181 U. S. 283; charter parties for the carriage of cargoes from State to foreign ports, United States v. Hvoslef, 237 U. S. 1; and policies of marine insurance on articles being exported—such insurance being uniformly regarded as 'an integral part of the exportation' and the policy as 'one of the ordinary shipping documents,' Thames & Mersey Insurance Co. v. United States, 237 U. S. 19. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring 'not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation.' Fairbanks v. United States, supra, 181 U. S. 292, 293. And the court has indicated that, where the tax is not laid on the articles themselves while in course of exportation, the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation." " 'The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.' "

Under the principles enunciated by the Supreme Court in the cases cited "it would seem clear that the Federal government may levy a general excise tax on the privilege of doing business in corporate form measured by the fair value of the capital stock and that the tax is not invalid in so far as or because the property or capital is employed in the export trade."

NATIONAL SAFE DEPOSIT COMPANY v. STEAD et al.

(U. S. Supreme Court, January 5, 1914)
(232 U. S. 58)

Record: Illinois Act of July 1, 1909. Bill in a State court to enjoin enforcement of the Illinois State inheritance tax law. Demurrer. Demurrer sustained and bill dismissed. The Illinois Supreme Court affirmed this decree on appeal. Writ of error. Affirmed.

Facts: Illinois passed an inheritance tax law which provided that no safe deposit company having in possession property in the joint names of a decedent and another person, should deliver the assets to the legal representative of the deceased, etc., without ten days' notice to the attorney general and State treasurer, who were authorized to examine the contents of the box. Even then, the contents were not to be surrendered without retaining enough to pay the tax, unless authorized by such State officers. Failure to comply with this law rendered the deposit company liable for the tax and to a penalty.

Plaintiff alleged that the safes could be opened only by two keys or two combinations, one of which was held by or known only to the renter, while the other was held by or known only to the company's agents; yet the defendants insisted that plaintiff had such possession or control of the contents as to make it incumbent upon it to prevent access thereto by all persons for ten days after the death of a sole or joint renter; that this deprived plaintiff of the right to do the business for which it was organized, interfered with its business, and imposed upon plaintiff the risk of determining who was the owner of the contents and the duty of acting as tax collector. Plaintiff asked that defendants be enjoined. The demurrer interposed was sustained and the bill was dismissed, and this was affirmed on appeal to the Illinois Supreme Court.

Question: Was the Illinois inheritance tax statute invalid as in violation of the 14th Amendment to the Constitution of the United States?

Decision: "The Illinois supreme court held that the relation created by the Deposit Company's contract was that of bailor and bailee. That construction by the state court is controlling, unless, as claimed by the complainant, it makes the statute violate the 14th Amendment, as being an arbitrary attempt to create liabilities arising out of possession, where there was no possession in fact."

The statute was held to be not an arbitrary attempt to create such liabilities. "The contention that the company could not be arbitrarily charged with the duty of supervising the delivery and determining to whom the securities belonged is answered by the fact that in law and by contract it had such control as to make it liable for allowing unauthorized persons to take possession." The statute does not impair the complainant's charter power to do a safe deposit business. "The claim that the statute compels the company to break its contract with joint renters and deprives the latter, for ten days, of access to the box and the right to use it or remove the contents, is without merit. The company, joint renters, or firms, each made the contract in the light of the state's power to legislate for the protection of the estate of any one of the joint renters or partners that might die during the term."

NEW CREEK COMPANY v. LEDERER, COLLECTOR

(U. S. Circuit Court of Appeals, Third Cir., February 8, 1924)
(295 Fed. 433)

Record: Revenue Act of 1916 as amended by Revenue Act of 1917. Suit to recover income and excess profits taxes for 1917 paid under protest. Judgment for defendant (288 Fed. 99). Writ of error. Affirmed. (Certiorari was denied by the Supreme Court on April 28, 1924.)

Facts: The plaintiff was the owner of coal lands which were acquired prior to March 1, 1913. The land was leased for coal mining on a royalty basis. The plaintiff in making its return, charged the entire amount received in royalties to depletion. The commissioner following Arts. 171 and 172 of the Regulations redetermined the depletion and assessed additional taxes.

Question: Was the plaintiff entitled to deduct as depletion the amount of royalty received?

Decision: The Commissioner held that the deduction for depletion allowance per ton mined was represented by the quotient found by dividing the total estimated number of tons, of unmined coal on March 1, 1913, into the sum representing the fair market value of the lands as of that date. "For purposes of taxation it has been held both in England and in this country that the product of a mine is a proper subject of taxation under income tax laws, notwithstanding the peculiarity that such a product is never income in the sense of increment and is always capital in the sense that it is something which is not produced but is always in being, and that its withdrawal and sale cause a corresponding depletion in the load and in the value of the mine. Keeping in view that we are dealing with a revenue act that called for a yearly tax on yearly income and embraced the product of mines as a subject of taxation, we start with the proposition, which we think is no longer open to question, that the proceeds from the sale of mined coal is gross income subject to taxation. We then come to the proposition that the taxable had no inherent right to deduct therefrom the capital cost of the coal mined, either under head of deterioration or depletion. * * * Whatever right a corporate mine-owning taxable had to deduct from the gross income of its mine anything for depreciation or depletion came to it solely by virtue of the statute under which the tax was assessed."

The act provided that income and excess profits taxes should be levied against " 'net income' which 'shall be ascertained by deducting from the gross amount of its income received within the year from all sources' expenses of operation and maintenance, losses not compensated by insurance and 'in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made.' " The act further provided that this reasonable allowance "should 'be made * * * under Rules and Regulations to be prescribed by the Secretary of the Treasury,' with

the limitation bearing both on the right of the taxable and the authority of the Secretary of the Treasury, 'that when the allowance authorized shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen [shall equal] the fair market value as of that date, no further allowance shall be made.' "

The intention of Congress was to exact an income tax yearly. The court said it did not find unreasonable the regulations prescribed by the Department as to the allowance for depletion nor that by those rules the taxable was deprived of the deduction which the statute allowed.

NEW JERSEY v. LOVELL

(U. S. Circuit Court of Appeals, 3d Cir., June 13, 1910)
(179 Fed. 321)

Record: Bankruptcy Act. Claim of New Jersey for franchise tax against a corporation in bankruptcy. Claim denied. Appeal. Affirmed. (Certiorari denied, 219 U. S. 587.)

Facts: The Halsey Electric Generator Company, a New Jersey corporation, was adjudged bankrupt. All of its property not covered by fixed liens was required for expenses incurred by the receiver in preserving its property. New Jersey claimed that all of these funds should be applied to pay the franchise tax.

Question: Was the state entitled to priority of payment for taxes from a bankrupt's estate over expenses of administration?

Decision: The court said that if the administration of law is to be respected, a court "without power or means for carrying out its orders must refuse to make such orders; otherwise its helpless jurisdiction will incur merited contempt." The court said it was clear that the claim of the state for taxes did not have priority over expenses of administration.

NEW ORLEANS et al. v. HOUSTON AND LOUISIANA STATE LOTTERY COMPANY

(U. S. Supreme Court, December 6, 1886)
(119 U. S. 265)

Record: Constitution of Louisiana, Act 77 of 1880 of the Louisiana legislature and the contract clause of the U. S. Con-

stitution. Bill in the U. S. Circuit Court by Louisiana State Lottery Company against New Orleans et al. to enjoin collection of taxes. Decree for plaintiff. Appeal. Affirmed.

Facts: The bill alleged that the company was a Louisiana corporation formed in 1868, whose charter provided that the company "shall pay the State of Louisiana the sum of $40,000 per annum * * * and said corporation shall be exempt from all other taxes and licenses of any kind whatever from the state, parish, or municipal authorities;" that the city sued for certain other taxes, claiming that such exemption was void; that on final hearing in the State Supreme Court said exemption was declared valid and the taxes illegal; that such charter exemption is a contract recognized as such by the present State of Louisiana; that defendants "are about to levy * * * a tax upon the capital stock and other property of your orator," and that defendants were threatening to proceed against the company for the collection of said tax. The answer claimed that the act of the legislature refusing the tax is in no respect null and void. The lower court determined that said charter clause was a contract preventing said tax. By an act of the legislature of March, 1879, the company's charter was repealed; the company was denied the privilege of selling lottery tickets, etc.; and penalties were provided for violation. The new Louisiana constitution which went into operation in December, 1879, provided that "The forty thousand dollars per annum now provided by law to be paid by the Louisiana State Lottery Company, according to the provisions of its charter granted in the year 1868, shall belong to the Charity Hospital of New Orleans, and the charter of said Company is recognized as a contract binding on the State for the period therein specified, except its monopoly clause, which is hereby abrogated; and all laws contrary to the provision of this article are hereby declared null and void; provided said Company shall file a written renunciation of all its monopoly features * * *." That provision was alleged to have been met.

The statute took effect before the adoption of the constitution. It was contended that the tax was not upon the corpora-

tion itself but upon the shareholders on account of their ownership of the shares.

Questions: (1) Did the new constitution revive the charter of the company, including the contract for exemption from taxation?

(2) Was the tax upon the corporation or upon the shareholders?

Decision: (1) A decision of the Louisiana Supreme Court had held that the charter was valid under the old constitution. The monopoly clause was held to mean the exclusive privilege originally granted of holding lotteries. "The constitutional article then proceeds to say that 'All laws contrary to the provisions of this article are hereby declared null and void.' " The act of the legislature of 1879, repeals "the charter of the Louisiana State Lottery Company, and prohibits it from drawing lotteries and selling lottery tickets."

"The effect, therefore, of article 167 of the Constitution of Louisiana is to revive the charter of the Louisiana State Lottery Company granted in the year 1868, notwithstanding its repeal by Act No. 44 of the year 1879, except as to the clause which confers upon it the exclusive privilege of establishing a lottery and dealing in lottery tickets, and to recognize the charter thus modified as a contract binding on the State for the period therein specified. This renews and establishes the obligation of the Corporation under section 1, article 5 of its charter, to pay to the State the annual sum of $40,000, in consideration of which it is declared to be 'exempt from all other taxes and licenses of any kind whatever, whether from state, parish or municipal authorities.' "

(2) "It is well settled by the decisions of this court that the property of shareholders in their shares, and the property of the corporation in its capital stock, are distinct property interests, and, where that is the legislative intent clearly expressed, that both may be taxed."

"But the question of legislative intent is always open upon the language of the exemption. In the present case the Corporation is exempted by its charter from all other taxes and licenses

of any kind whatever in excess of the sum of $40,000 per annum, and yet by Act No. 77, though the assessment is not to be made upon its capital stock, but upon the shares of shareholders appearing upon its books, nevertheless, the tax so assessed is to be paid by the Company, although it is entitled to collect the amount so paid from the shareholder on whose account it is payable; but this payment by any Company is to be made irrespective of any dividends or profits payable to the shareholder out of which it might be repaid. * * * The taxes are assessed upon the actual shares as registered in the names of individual shareholders but are to be paid by the Corporation, so that, while the form and mode of taxation is changed, its substance remains as though assessed against the Corporation by name."

NORTHERN PACIFIC R. CO. v. CLARK

(U. S. Supreme Court, April 30, 1894)
(153 U. S. 252)

Record: Suit to enjoin collection of tax upon lands. Certificate from the Circuit Court of Appeals for the eighth circuit of propositions of law upon which instructions were asked. Instructions given.

Facts: The Circuit Court (47 Fed. 681) sustained a demurrer and dismissed the bill, one of the grounds being that the bill was without equity in failing to allege payment or tender of the gross earnings tax for the year 1889. The company appealed to the Circuit Court of Appeals which certified certain questions to the Supreme Court, including the question whether the bill was "without equity because of the failure to aver that the complainant has tendered or paid the 'gross earnings tax' for the year 1889; and is said complainant entitled to the equitable relief prayed without first tendering or paying such tax?" An act of the legislature which provided that certain railroad companies, including this company, should pay a tax of two per cent on their gross earnings, etc., in lieu of all other taxes was repealed, but at the time of the repeal the company was in default for the years 1886 to 1888, inclusive. Another taxing act was passed, leaving to the railroad companies the election whether to be

taxed according to the gross earnings or upon the property owned, except for the year 1889, when the gross earnings tax should be applied. It was made a condition of the acceptance of the act that the unpaid taxes under the old act be paid within thirty days. The company accepted the provisions and benefits of this later act within thirty days and paid the taxes in arrears, but it is not alleged that it paid the taxes for 1889 or any portion thereof.

Question: Was the company entitled to equitable relief, not having paid or tendered the tax admitted to be owing?

Decision: "Being liable to pay either the percentage on gross earnings in accordance with the provisions of the act of 1889, or the tax upon its lands, as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of those modes of taxation."

"Our response, therefore, to the eighth question certified is, that the bill was without equity, because of the failure to aver that the plaintiff had tendered or paid the gross earnings percentage for the year 1889 (or the tax assessed by the county auditors) and was not entitled to the equitable relief prayed without first tendering or paying such taxes."

NORTHERN TRUST COMPANY v. BUCK & RAYNER

(Illinois Supreme Court, April 23, 1914)

(263 Ill. 222)

Record: Illinois inheritance tax law. Covenant for the recovery of inheritance tax which appellant was obliged to pay by reason of the passing of certain property under the will of his testator, Starkweather. Demurrer. Demurrer sustained. Appeal. Affirmed by Appellate Court. Appeal. Affirmed by Illinois Supreme Court.

Facts: Starkweather, owning certain real estate, made a 99-year lease thereof. This lease, by successive assignments, became the property of appellee. After the death of Starkweather, an Illinois inheritance tax of $8,010.85 was assessed, which the appellant was obliged to pay. Under the lease, the lessee covenanted to pay "all water rates and all taxes, assessments and municipal

or governmental charges, general and special, ordinary and extraordinary, of every nature and kind whatsoever * * * (a) levied * * * upon any land hereby demised * * *: or (b) levied * * * upon any interest of the lessor in or under this lease; or (c) which the lessor shall be required to pay by reason of or on account of his interest in said land and improvements or in or under this lease * * *'' and to indemnify the lessor against all liens and charges against the land as a consequence of any act or omission of the lessee. The lessor in his will had made a provision for the payment of inheritance taxes.

Question: Did the covenants in the lease require the lessee to repay inheritance taxes paid by the lessor?

Decision: The court said it was not in the contemplation of the parties that the lessees should pay every tax upon the premises but only such as the property was in fact liable for and which the lessor might be required to pay by reason of his interest in the land. The argument was that clause (c) expanded the meaning of the previous language so as to include the liability to pay an inheritance tax. An inheritance tax is not a tax at all upon property. It is a condition which the state imposes upon the right or privilege of succeeding to the ownership of property by descent or will. The court held that appellee was not required to reimburse appellant for the inheritance taxes paid.

NUNN, COLLECTOR, v. WILLIAM GERST BREWING CO.
(U. S. Circuit Court of Appeals, Sixth Cir., February 12, 1900)
(99 Fed. 939)

Record: Dingley Tariff Act of 1897 and Section 3341 Revised Statutes. Suit by William Gerst trading as William Gerst Brewing Co., to recover of Nunn, Collector of Internal Revenue for the Fifth District of Tennessee, the sum of $810.75. Cause was begun in the chancery courtof Davidson County, Tennessee, and was removed to the court below on the petition of the defendant. Judgment for plaintiff. Affirmed.

Facts: On July 23, 1897, about noon, the plaintiff ordered of the defendant beer stamps of the face value of $10,810. Defendant said they could not be delivered that day but would be ready

in the morning. Plaintiff's manager called for them at 9 o'clock on July 24th. He paid $9,999.25 for the stamps, being allowed 7½ per cent discount of the face value in accordance with Section 3341 of the U. S. Revised Statutes, amounting to $810.75. At the time of the order and delivery of the stamps the company had enough beer ready for market to use the stamps. On July 24, 1897, at 4 minutes past 4 o'clock in the afternoon the President signed the Dingley Tariff Act which repealed the provision of Section 3341, Revised Statutes, which allowed the 7½ per cent reduction upon all sales of such stamps to any brewer, and by him used in his business. Later the collector, on instructions of the Commissioner of Internal Revenue to collect all such discounts allowed on or after July 24th without regard to the date of the order for the stamps, assessed and collected, over the protest of the plaintiff, the $810.75 previously allowed as discount. An application for refund was rejected and the plaintiff brought this suit.

Questions: (1) Did the Dingley Act become law from and after midnight of July 23, 1897, although actually signed by the President at 4:04 p. m. of July 24th?

(2) Under Section 3341 of Revised Statutes did the right to discount accrue upon the sale of the stamps or only after the stamps had been used in the business by the brewer?

Decision: (1) Referring to Carriage Co. v. Stengel, 95 Fed. 637, the court held: "We there found and stated the law to be that in the absence of proof there is a presumption that the act was signed on the first minute of the day when it took effect, but that it was competent to show by proof the exact time when the law was approved by the President, and that when this was made to appear the law could only be given effect from that time. * * * It necessarily follows that the law was not in force at the time the stamps were bought and the discount was allowed."

(2) "The language of the section (granting the discount) will easily bear two constructions. The phrase 'by him used in his business' may be construed to be a postponement of the time for allowing a discount until the stamps have been used in the business, or it may be held to mean that the discount is to be allowed

on all sales of stamps 'by him to be used in his business,' or in other words 'stamps purchased for the purpose of being used in the business.' The practical construction put upon the section by the Department sustains the latter interpretation. The allowance has always been made upon the sales at the time the sales were made. * * * The effect of such 30 years' construction of the statutes by those who are charged with its enforcement is controlling. * * * The right to the discount accrued at the time of the purchase of the stamps."

OCKENFELS et al. v. BOYD

(U. S. Circuit Court of Appeals, 8th Cir., April 27, 1924)
(297 Fed. 614)

Record: Acts of June 13, 1898, and October 3, 1917. Suit by Boyd against Ockenfels and others to foreclose a mortgage. Decree for complainant and defendants appeal. Affirmed.

Facts: The note secured by the mortgage did not have the required revenue stamps, and it was insisted that the note and mortgage were invalid and could not be received in evidence.

Question: Were notes which did not bear the required revenue stamps admissible in evidence?

Decision: The court said that it was the Act of October 3, 1917, which required the stamping of the notes and that Act "does not render an unstamped document invalid or exclude it as evidence. Cole v. Ralph, 252 U. S. 286 [ante 148] * * *. Moreover, it was undisputed that the note had the necessary revenue stamps on it when it was purchased by Boyd and the trial court found that it had been stamped by Ockenfels, or some one in his behalf. There was testimony that it was stamped at the time it and the mortgage were executed."

OLIVER v. UNITED STATES

(U. S. Circuit Court of Appeals, 4th Cir., July 6, 1920)
(267 Fed. 544)

Record: Harrison Narcotic Act. Prosecution for violation of the act. Conviction. Writ of error. Reversed.

Facts: Oliver was convicted of violation of the Harrison Narcotic Act. At the trial there was offered evidence of a compromise, which evidence was excluded.

Question: Should evidence of a compromise have been received, and what evidence is required?

Decision: "Under this statute a compromise once effected, whether before or after prosecution, is as complete a discharge of the defendant as a verdict of acquittal by a jury. The evidence here shows that the defendant, not only adopted the course provided by statute, but that he acted under the specific advice of a representative of the government. It is true that there was no evidence that he had obtained or attempted to obtain directly from the Secretary of the Treasury his advice and consent, or that he had directly obtained or applied to the Attorney General for his recommendation. The statute does not expressly state how the consent or approval of these officers is to be obtained. It is evidently contemplated, however, that the advice and consent of the Secretary of the Treasury and the recommendation of the Attorney General should be sought and obtained by the Commissioner of Internal Revenue, who himself finally passes upon the matter, and who is the party charged with directly dealing with the defendant, and it is to be presumed that, when he finally accepts an offer of compromise of a defendant, he has previously discharged his duty of communicating with the other officers. To hold otherwise would bring the acts of the officers of the government under inquiry and frequently under a suspicion which ought not to be allowed to arise. It is of the highest importance that citizens, who deal with an officer of the government charged with an official duty, shall have the right to presume, in every instance, in the absence of positive proof to the contrary, that such officer did his duty.

So far as the evidence went, it tended to show "that the money offered in compromise to the proper officer of the government had been accepted and retained by him, and it should have been submitted to the jury as at least tending to show that a compromise had been effected."

The court quoted with approval from United States v. Chouteau, 102 U. S. 603 (ante 531) and Rau v. United States, 260 Fed. 131 (ante 422).

ORNER v. SAUNDERS

(U. S. Circuit Court, W. D. Missouri, November Term, 1875)
(Fed. Cas. 10,584)

Record: Act of March 3, 1875. Action begun in state court. Removed to U. S. Court. Motion to remand. Motion denied.

Facts: An action was begun in a state court by the Collector of Internal Revenue of one of the districts of Missouri against his deputy collector upon his official bond, alleging breaches thereof. The plaintiff in due time, before answer filed, applied to remove the cause to the Federal Court under Act of March 3, 1875, as one arising under the constitution and laws of the United States.

Question: Was the removal proper?

Decision: "We have no doubt the cause was properly removed. It is one arising under the laws of the United States. Rev. St. Sec. 3148; Act March 3, 1875, Sections 1-3; Act February 8, 1875, Section 12 (18 Stat. 309), Osborn v. United States Bank, 9 Wheat. (22 U. S.) 739. Indeed, this last act gives this court original jurisdiction of such actions, concurrent with the state courts."

OULTON, COLLECTOR, v. GERMAN SAVINGS & LOAN SOCIETY
OULTON, COLLECTOR, v. SAN FRANCISCO SAVINGS UNION

(U. S. Supreme Court, April 28, 1873)
(84 U. S. 109)

Record: Acts of June 30, 1864, and July 13, 1866. Suit in a state court to recover taxes paid. Removed by defendant into the United States Circuit Court. Answer was filed and a motion in the nature of a demurrer. Plaintiff was held entitled to recover. Writ of error. Reversed and remanded.

Facts: Taxes were assessed against the banks and were paid, both under protest. The collector claimed that the banks

were not within the proviso exempting certain savings banks from taxation, because as to the first named bank, it had a capital stock of $100,000; because it did other business than receiving deposits, etc., and because the deposits were subject to payment by check or draft. The pleadings, proceedings and evidence were substantially the same in the case of the other bank.

Question: Were the banks subject to the tax assessed?

Decision: The court said that unrestrained by the proviso, the banks would be taxable, as the managers had a place of business where credits are opened by deposit, etc., subject to be paid by check, etc. "Such banks are not exempt * * * if they have a capital stock, nor if they do any other business than receiving deposits to be loaned or invested for the sole benefit of the person making such deposits * * * 'and without profit or compensation to the association' * * *." It is clear that the banks do not "fall within the category described in the proviso and that the tax was legally assessed and collected."

OWENSBORO NATIONAL BANK v. OWENSBORO et al.
(U. S. Supreme Court, April 3, 1899)
(173 U. S. 664)

Record: Kentucky Act of November 11, 1892, as amended, and section 5219 R. S. Bill brought by the bank to enjoin the defendants from collection of alleged franchise tax. Suit dismissed. Affirmed by the Court of Appeals of Kentucky. Writ of error. Reversed and cause remanded.

Facts: The taxes were for the years 1893 and 1894 under authority of a revenue act of Kentucky and were based upon the par of the capital stock, the surplus and undivided profits. It is admitted that the avails of the bank to the amount of the valuation were invested in non-taxable bonds of the United States.

Question: Upon what were the Kentucky taxes in question levied and were they legal?

Decision: Section 5219 R. S. is the measure of the power of a state to tax national banks, their property or their franchises. The power is confined to taxing the shares of stock in the hands of the shareholders and to an assessment of the real estate of the

bank. The tax in question "is a tax nominally on the franchise of the corporation, but in reality a tax on all the intangible property of the corporation." The taxing law in question "is beyond the authority conferred by the act of Congress, and is therefore void for repugnancy to such act."

The court held that a tax on the bank or its property was not equivalent to a tax on the shares of stock in the hands of the stockholders.

PACE v. BURGESS, COLLECTOR

(U. S. Supreme Court, April 17, 1876)
(92 U. S. 372)

Record: Acts of July 20, 1868, and June 6, 1872. Suit to recover amount paid for stamps, 1869 to 1873, inclusive. Judgment for defendant. Writ of error. Affirmed.

Facts: The stamps were affixed to packages of manufactured tobacco intended for exportation. Plaintiff was a manufacturer of tobacco. The acts in question imposed an excise tax on certain manufactured tobacco and penalties were imposed for removing the tobacco without proper stamps, etc., indicating compliance with the law. Tobacco intended for export was excepted but it was provided that such tobacco should have a stamp affixed to the package in which it was contained showing it was to be exported, for the expense of which 25c for each package was charged. Plaintiff contended that this charge was a duty on exports, contrary to the provision of the Constitution that "no tax or duty shall be laid on articles exported from any state."

Question: Was this charge a tax on exports?

Decision: Referring to the contention of the plaintiff the court said: "But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and to secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp

used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. The large amount paid for such stamps by the plaintiff only shows that he was carrying on an immense business."

PAGE v. SKINNER

(U. S. Circuit Court of Appeals, 8th Cir., April 28, 1924)
(298 Fed. 731)

Record: Revenue Acts of 1916, 1917 and 1918. Action to recover a portion or all of the tax paid by the estate of a decedent. A demurrer interposed was sustained and the suit dismissed (293 Fed. 468). Writ of error. Affirmed.

Facts: William Byrd Page died testate September 4, 1918. Plaintiff in error was his sole devisee and legatee and the executrix. She filed the estate tax return. The 1918 Act was in effect when the return was filed and she contended that the prior acts had been repealed, as the 1918 Act contained no saving clause; or that if a tax should be assessed it must be at the lower rates prescribed by the 1918 Act. Both contentions were rejected and the tax was assessed according to the rate of the prior acts and the amount was paid under protest. In the District Court a demurrer was interposed, the suit was dismissed and the plaintiff brought a writ of error.

Question: Which, if any, act applies to the estate?

Decision: The court quoted sections 401 and 1400 of the Revenue Act of 1918, and called special attention to the following provisions: "'Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes;'" and "'in the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain

in force until the corresponding tax under this Act takes effect under the provisions of this Act.' "

"For the purposes of this case we take the last sentence as an expression of a clear intention that the parts of the two prior Acts imposing estate taxes were not repealed as to all estates of decedents dying prior to February 25, 1919; and we may add that, impliedly, the liens given by the prior Acts for the collection of the taxes which they imposed were intended also to continue."

PARK BUILDING CO. v. YOST FUR CO.

(Michigan Supreme Court, December 22, 1919)

(208 Mich. 349)

Record: Assumpsit in Justice's Court by Park Co. against Yost Co. for the amount of a federal income tax paid upon rental received from defendant. Judgment for defendant. Affirmed by the Circuit Court on appeal. Writ of error. Affirmed.

Facts: The Park Co. rented certain property for ninety-nine years to Van Husan. It was organized for the sole purpose of owning and leasing this property. It had no other property. Van Husan subleased to the Yost Co. and then assigned the sublease to the Park Co. The United States assessed an income tax for 1916 against the Park Co. upon the income derived from the annual rental. The suit was to recover the amount of the income tax paid by plaintiff and claimed from defendant under the lease. In the lease the Yost Co. agreed to pay "all rates, taxes, charges for revenue and otherwise, assessments and levies, general and special, ordinary and extraordinary of every name, nature and kind whatsoever, including water rates, which may be taxed, charged, assessed, levied or imposed upon said premises and upon any and all buildings and improvements thereon and any personal tax levied or assessed upon said party of the first part, which may be assessed, levied or imposed upon the leasehold estate hereby created and upon the reversionary estate in said premises * * *; the intent hereof being to insure to said party of the first part the net rental hereunder, not chargeable with any burdens by way of taxes, or otherwise, resulting in the diminution of the same."

Question: Did the lease require the lessee to pay the federal income tax assessed upon the lessor?

Decision: The court said that when the lease was entered into there was an income tax in force and that said lease "nowhere makes any direct reference to a personal income tax." The lease required the lessee to pay all taxes upon "said premises," "all buildings and improvements thereon," "the leasehold estate hereby created," and "the reversionary estate in said premises," and the following section provided that the lessee shall pay "its pro rata share, for the balance of that tax year, of the city tax, and the state and county taxes for 1915-1916, 'which may be levied upon said premises,' and within thirty days * * * obtain and deliver to said first party duplicate tax receipts * * * with no suggestion indicating an intent that the tenant should pay any portion of the personal income tax which might be assessed or levied against the lessor for 1916 or later."

The court said the question turned on the construction of the sentence relative to net rental. "Clearly it does not impose upon the lessee in any direct language payment of all taxes levied upon or *in respect to the rent* howsoever and to whomsoever assessed, as in the Suter case [225 Mass. 34] nor those levied and assessed *upon rent payable*, whether as rental or *income*, as in the Kimball case [229 Mass. 541]. Neither does it in like direct and express terms confine the lessee's burden to taxes payable for or in respect of *the leased premises,* as in the Codman case [229 Mass. 285]."

It is a long settled rule of construction, "that words of specification draw into the same class any general terms or words presumably super-added to attain the end without further prolixity. In this tax clause the conveyancer was liberally prolix in details and words of specification relative to the kinds of taxes the lessee must pay and upon what imposed, immediately preceding the general terms with which the last sentence in the paragraph concluded. * * * It is not an unreasonable presumption that had the contracting parties had in mind, agreed upon, or intended to impose payment of the landlord's income tax on the lessee, they would have expressed the intent in equally clear and positive

language with appropriate descriptive terms, which they could readily have done without multiplying words."

PARK FALLS LUMBER COMPANY v.
BURLINGAME, COLLECTOR

(U. S. Circuit Court of Appeals, 7th Cir., July 23, 1924)
(Not yet reported)

Record: Section 3176 R. S. and Section 1317, Revenue Act of 1918. Suit to recover additional capital stock tax paid. Petition dismissed. Writ of error. Affirmed. (Pending in the Supreme Court.)

Facts: Plaintiff was incorporated under a different name in 1907. In February, 1913, $3,450,000 full paid capital stock was issued. At the time here in question plaintiff had surplus and undivided profits of $155,259.91 and to represent the actual value of its property on March 1, 1913, plaintiff added "unearned surplus to date, $774,802.03." In its capital stock tax return for the fiscal year ending June 30, 1920, it took simply the par value of the stock, from which it deducted the $5,000 exemption. The Commissioner added said surplus and undivided profits and said unearned surplus and the additional tax was assessed thereon.

Question: What is the authority of the Commissioner as to additional assessments?

Decision: The court cited and quoted from a number of cases as to the discretionary authority vested in the Commissioner and then quoted from Section 3176 R. S., as amended, and said it was of the opinion that this section was applicable, because the plaintiff had wilfully and intentionally omitted as an element in fixing the value of its capital nearly $2,000,000 represented by the unearned surplus and the surplus and undivided profits. That section gave the Commissioner the authority to make or amend a return and provided that his return should be prima facie, "good and sufficient for all legal purposes."

The court then took up in detail the offers of evidence which were excluded. Many of the matters, evidence of which was excluded, were fully set forth in the statements to the Commissioner. "There is nothing in any of the evidence offered that fairly tends to overcome the finding of the Commissioner. The correspond-

ence between the Commissioner and plaintiff shows that the Commissioner took into consideration not only the facts as presented to him by the plaintiff, but also all of the relevant facts that were then obtainable and we see nothing in the evidence tendered and rejected that would overcome the assessment of the Commissioner even though it be considered to be but prima facie right.''

PARKER v. RULE'S LESSEES

(U. S. Supreme Court, February Term, 1815)
(9 Cranch. 64)

Record: Act of July 14, 1798, Sections 11 and 13. Ejectment. Error to U. S. Circuit Court, D. West Tennessee. Judgment for plaintiff affirmed.

Facts: Defendant claims under a deed from collector on sale as forfeited for non-payment of taxes. The collector had not published the tax list with notice to pay the tax. The owner of land was a non-resident.

Question: Was the tax sale valid?

Decision: The sale is void since the owner of the land was a non-resident. The validity of the sale of land of a non-resident for non-payment of taxes depends on publication according to law.

PATENT CASTINGS SYNDICATE, LTD., v. ETHERINGTON

(Chancery Division, English Supreme Court of Judicature, November 6, 1919)
(1 Ch. 306, 1919)

Record: English Excess Profits Tax, Finance (No. 2) Act, 1915, and the Finance Act, 1916. Suit to determine whether the net profits of the company, a percentage of which was payable to the manager as a commission, should be ascertained after deducting or without deducting the excess profits duty payable by the company. Held that the excess profits duty should first be deducted in ascertaining the net profits.

Facts: The company employed Etherington at a salary and a commission, the provision for the latter being that it would pay

him, at the end of each business year, 5 per cent on the net profits up to 5,000 pounds, and 7½ per cent on the net profits in excess thereof, the decision of the auditor to be binding upon him as to what constituted the net profits. The company sued to determine the construction of the contract as to whether the net profits referred to should be ascertained after deducting or without deducting the excess profits duty payable by the company.

Question: In arriving at the net profits, a percentage of which was payable as a commission, should the excess profits tax first be deducted?

Decision: At the date of the contract, the excess profits duty was in existence and "must be taken to have been known to both of the parties, a circumstance not to be found in all the cases in which the effect of this duty upon such agreements has been considered. * * * The profits with reference to which the duty is, according to the Act of 1915, computed are not, either nominally or in any sense, 'net profits' of a business, the phrase with which we are here concerned. The standard of 'profits' thereby fixed is an arbitrary standard set up by the Legislature for the purpose only of the tax (s. 40, sub-s. 1, of the Act of 1915), and it results in a fund which differs both from that represented by the returns of profit for the purpose of income tax, and, in many far-reaching respects alike of omission and addition, from any fund constituting the net profits of a business in any ordinary acceptation of these words. I must also for the sake of clearness emphasize two further provisions of the statute of 1915: s. 35, which for the purposes of income tax treats the excess profits duty as an outgoing of the business reducing the profits in respect of which income tax is assessable; and s. 45, sub-s. 3, which provides that the amount of the excess profits duty 'shall be recoverable as a debt due to His Majesty from the person on whom it is assessed,' in the present case the plaintiff company. In these circumstances the question here is whether the fund of which the defendant is to receive a percentage, and which in the agreement is described as 'the net profits for the year of the said business'—i. e., of the business of the plaintiff company—is a fund which, like the profits on which income tax is assessable, is to be arrived at after treating the excess profits duty

as an outgoing, or whether the excess profits duty is part of the fund in the same way as under the Act of 1915 that duty is part of the 'profits'—not, be it again observed, 'net profits'—with reference to which the amount of the duty is arrived at.''

Referring to other cases on this subject the court said, ''each of these cases might have been decided as they were by reference to the actual words without further inquiry into principles. The phrase here, however, is not so clear, although the agreement apart from the words themselves is not lacking in some indications as to what is being pointed at.

''First of all, the profits are 'the net profits for the year of the company's business'—a circumstance of some little significance, in that the employment of the defendant is not for other purposes fixed with reference to any such year. Again, the defendant's share of these 'net profits' is to be paid to him within seven days of the holding of the annual general meeting of the company, that is to say, that, unlike his fixed remuneration which is payable to him by monthly installments, he is to have his agreed share of profits within seven days of the meeting at which these profits as a whole would in the usual course be divided or applied. And we have this additional circumstance, which naturally leads to what I believe to be the true conclusion of the whole matter: the certificate of the company's auditor is not to be, as it might have been, a certificate of the actual amount payable to the defendant, but is to be a certificate of 'what constitute the net profits (if any) as aforesaid at the end of any such business year of the company,' that is to say, a certificate of the whole net profits. In truth, this part of the agreement is in its essence a profit-sharing arrangement in which there is implicit the assumption that the subject-matter of division exists as a fund for division between the participants, and, just as Peterson J. arrived at that conclusion in In Re Condran upon an agreement not materially different from the present, so I here arrive at the conclusion that the 'net profits' of the business for the year are the excess of the receipts for the year over the current expenses and outgoings of the same year; or, putting it otherwise, they are the fund which for that year is capable of being lawfully applied by the company to the payment of a dividend.''

The court discussed a number of prior cases and then said: "I can see no sound distinction between this case and In Re Condran [1917] 1 Ch. 639, with which I find myself in entire agreement. I therefore follow it, and decide that the amount to be paid to the defendant at the end of each business year ought to be ascertained after deducting the excess profits duty payable by the plaintiffs in respect of such year."

PATTON v. BRADY, EXECUTRIX

(U. S. Supreme Court, March 17, 1902)

(184 U. S. 608)

Record: Act of June 13, 1898. Patton brought suit in the Circuit Court against Brady as collector of internal revenue to recover a sum paid as taxes. Motion to dismiss sustained. On writ of error the Supreme Court affirmed the dismissal.

Facts: In May, 1898, the plaintiff bought manufactured tobacco on which there were affixed stamps that were cancelled subsequent to April 14, 1898. After the Act of June 13, 1898, was passed, Brady demanded an additional tax, which he claimed was imposed by the second paragraph of the third section of said Act. The Act of June 13, 1898, increased the tax from 6 to 12 cents a pound. Plaintiff paid the tax under protest. His appeal to the Commissioner for a refund was rejected. He then brought suit alleging in part that the third section of the Act of June 13, 1898, was repugnant to the constitution. Brady died, and his executrix was substituted as party defendant.

Questions: (1) Did the court have jurisdiction of the case, the parties being citizens of the same state?

(2) Did the action abate by reason of the death of the defendant?

(3) Was the tax on tobacco a direct tax requiring apportionment?

(4) Did the imposition of one excise exhaust the power of Congress so that it could not impose another?

(5) When an excise was paid on tobacco by the manufacturer, was it subject to another excise in the hands of a dealer?

Decision: (1) When the right of either party depends on the validity of an Act of Congress, the case arises under the constitution of the United States. The plaintiff's right of recovery was based upon the constitutionality of the Act of 1898 and so arose under the constitution of the United States, and the Federal court had jurisdiction.

(2) As Congress has not prescribed the causes which survive the death of either party, the question must be settled by the law of the state in which the cause of action arose, or by common law. By the Code of Virginia an action may be maintained against a personal representative for "taking or carrying away any goods." The term "goods" is broad enough to include money. Under the common law a cause of action survived against the personal representative of a party who had increased his estate by his tort. This cause of action survived.

(3) "The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article." It is therefore not a direct tax but an excise tax within the definitions of general dictionaries and such legal authorities as Cooley, who, in his work on Taxation, page 3, defines it as "an inland impost levied upon articles of manufacture or sale and also upon licenses to pursue certain trades, or to deal in certain commodities." It need not be apportioned.

(4) No difference exists, said the court, in the nature of an excise and as ordinary property tax which forbids a repetition or increase in the one case and permits it in the other. "They are each methods by which the individual is made to contribute out of his property to the support of the Government." The court pointed out in another place that "it must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the Government has ceased." Taxes are enforced contributions to the support of the Government. "The obligation of the individual is continuous and proportioned to the extent of the public wants."

(5) "Neither can it be said that the change in the ownership of the tobacco in the case at bar had placed it beyond the reach of an excise. It is true that it had passed from the manufacturer, but it had not reached the consumer. By Section 3 of the statute the charge is placed upon articles which 'were at the time of passage of this Act held and intended for sale,' and this tobacco was purchased and held for sale by the plaintiff. Within the scope of the various definitions we have quoted there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer."

PAULSEN et al. v. PORTLAND et al.

(U. S. Supreme Court, April 17, 1893)

(149 U. S. 30)

Record: Fourteenth Amendment and Ordinance of City of Portland. Plaintiffs, lot owners, sue to set aside tax assessments. Demurrer to complaint sustained and complaint dismissed. Affirmed by Oregon Supreme Court. Writ of error. Affirmed by U. S. Supreme Court.

Facts: A sewer was constructed in pursuance to city ordinance. The plaintiffs challenge the validity of the assessments on the ground that the ordinance does not provide for notice. Notice was in fact given.

Question: Is the assessment illegal because the ordinance does not expressly provide for notice?

Decision: "While not questioning that notice to the taxpayer in some form must be given before an assessment can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice * * * and it is enough * * * that the power is granted in general terms, for where granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions."

PEACOCK v. LEHMANN et al.

(U. S. District Court, N. D. Illinois, June 7, 1923)
(Not yet reported)

Record: Revenue Act of 1918, Article 342 of Regulations 45. Bill to enjoin trustees from paying income tax. Temporary injunction granted.

Facts: Complainant is one of six beneficiaries under a deed of trust which gave the trustees full control and management of the property and permitted them in their discretion either to distribute the income or accumulate it. Complainant paid tax upon the income she received for 1918 and 1919. Collector acting under Article 342 of Regulations 45 demands payment of tax from Trustees for these same years, which the trustees intend to pay.

Question: Should injunction issue?

Decision: Defendants were enjoined, until further order, from paying said sums demanded as income tax for 1918 and 1919.

PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES et al. v. LEDERER, COLLECTOR

(U. S. District Court, E. D. Pennsylvania, September, 1921)
(292 Fed. 629)

Record: Revenue Act of 1918. Action to recover Federal estate taxes paid under protest. Decision for defendant.

Facts: Rebecca Colfelt was the only child of James McManes, who died prior to the passage of the 1918 Act, and by will devised all the residue of his estate to trustees, certain annuities to be paid to his grandchild and the balance of the income to be held for the benefit of his daughter for life, with a general power of appointment and made provision for the case of default of the exercise of the power. The daughter exercised the power of appointment. The power of appointment was exercised after the passage of the Revenue Act of 1918 and the estate tax was levied under this Act upon the value of the property disposed of, including that covered by the power of appointment. The "final recipients of the gift, who take by virtue of the exercise of the power, are the same persons who would have taken had the power not been exercised."

Question: Was the estate which was disposed of by the power of appointment a part of the estate of the daughter subject to tax under the Revenue Act of 1918?

Decision: The court held that although "it is well settled that under the law of Pennsylvania the appointee of a power takes, when he takes, not under the will of the donee of the power but under the will of the donor," nevertheless, Congress has defined "gross estate" "as the value of all property of the estate, including that passing to an appointee 'to the extent of any property passing under a general power of appointment exercised by the decedent.' * * * We can discover in the words of Congress no other meaning than the intention of measuring the tax to be paid by the gross value of all the property of the decedent which passed by will plus the value of all property which passed in practical effect by the same will, although it passed not by virtue of dominion over property but by virtue of a power of appointment." The court further held that the estate tax is an excise tax measured by the value of the gross estate less certain prescribed deductions, and that the express inclusion by Congress in the gross estate of property passing under a general power of appointment did not violate any provision of the Federal constitution.

PENROSE v. SKINNER, COLLECTOR

(U. S. District Court, D. Colorado, August 14, 1923)
(298 Fed. 335)

Record: Action to recover additional income tax paid for 1913. Demurrer to answer. Demurrer sustained. (See also Penrose v. Skinner, 278 Fed. 284, ante 956.)

Facts: An additional income tax for 1913 of over $12,000 was assessed. A claim for abatement was filed, which was allowed by Commissioner Osborn. Thereafter, his successor, Commissioner Roper, reassessed the tax and Penrose was obliged to pay it, which he did under protest. His claim for refund having been refused, he brought this suit.

Question: Was the original decision, allowing abatement, *res adjudicata* so that the tax could not be reassessed?

Decision: "If it may be determined upon the face of the pleadings that there was an adjudication of the matter upon its merits by Commissioner Osborn, in the absence of fraud or mistake, this court is without jurisdiction to now go into the matter, as the Supreme Court has held that, under the circumstances outlined, the action of a department head, which is founded upon the facts touching the controversy presented to it, is final." The court then quotes from United States v. Kaufman, 96 U. S. 567 (ante 547). It was contended that the only matter considered by Commissioner Osborn was whether or not Penrose was, at the time of certain losses, engaged as a licensed broker or member of a stock exchange, so as, under the rule of the department, to be entitled to receive credit for certain losses. The court said that a decision must rest on what was before Commissioner Osborn at the time he allowed the abatement, and, as the whole matter was then before him, the succeeding Commissioner could not overrule or ignore his decision.

PEOPLE ex rel. BREWSTER v. WENDELL

(N. Y. Supreme Court, App. Div. 3rd Dept., May 4, 1921)
(188 N. Y. S. 510)

Record: New York State Income Tax of 1919 and Article 91 of the regulations thereunder. Wendell, comptroller, assessed an additional income tax on Brewster for 1919. Brewster sued out a writ of certiorari to review the determination. Reversed.

Facts: The relator, on January 1, 1919, owned certain stocks and bonds of the fair market value of $70,000. May 1, 1919, he gave these securities away. When the gift was made, they had a fair market value of $72,000. He did not list these for taxation but reported them in a rider to his return, claiming that the regulation of the comptroller requiring their taxation was unlawful and void. The comptroller assessed this difference in value.

Question: Was the increase in value taxable?

Decision: "The section above cited does not attempt to vest legislative powers in the comptroller; it is simply that he shall have power 'to make such rules and regulations * * * as it (he) may deem necessary to enforce the provisions of this article,'

and if the article itself does not authorize the tax which has been levied, then no language of the comptroller's regulations can accomplish this result.''

The statute imposed a tax upon net income as therein defined. After quoting the statute, the court said: ''It is to be noticed that the language of the statute is that 'for the purpose of ascertaining,' not the value, but the 'gain derived * * * from the sale or other disposition of property,' the market value as of January 1, 1919, is to be taken as the basis.''

Other sections of the statute were then quoted, and the court said: ''Obviously sections 353, 354, and 355 are to be read together and construed as defining income as required by section 351, and when we find in section 353 that 'for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property' we are to understand 'other disposition of property' to relate to the methods of disposition provided for in the subsequent sections, dealing with exchanges and with reorganizations, mergers, or consolidations of corporations, or with 'dealings in property' as contained in section 359. In the latter section it is provided that 'gross income' includes 'gains, profits and income derived from * * * professions, vocations, trades, businesses, commerce, or sales, or dealings in property, * * * growing out of the ownership or use of or interest in such property.' The purpose of the statute is to levy a tax upon incomes derived from 'professions, vocations, trades, businesses, commerce, or sales, or dealings in property,' and the United States Supreme Court defines income as the 'gain derived from capital, from labor, or from both combined.' Doyle v. Mitchell Brothers Co., 247 U. S. 179. [ante 353] * * * It is the deriving of the income, not the increase in value that is made subject to the tax, and how it can be held that the relator, in giving away his property, derived an income subject to taxation from a sale or dealing in property or a sale or other disposition of property (sections 353, 359) is not easy to understand. There was no gain derived to the relator in giving away his property. In law it was a loss of property; it was a taking out of his estate not only the capital, which was invested prior to 1919, but the increase in value which had followed, just

as much as though a fire had destroyed the property represented by the securities and no insurance survived.''

After quoting article 91 of the comptroller's regulations, that gifts constituted a taxable disposition of property, the court said: ''To give it the construction asserted by the comptroller is to extend the provisions of the act by implication 'beyond the clear import of the language used' and to enlarge its 'operations so as to embrace matters not specifically pointed out,' in violation of the well-established rule cited. The determination of the comptroller should be reversed, and the tax adjusted upon the basis of the relator's contention.''

PEOPLE ex rel. H. JAECKEL & SONS, INC., v. GILCHRIST et al.

(New York Supreme Court, Appellate Division, 3d Dept., May 8, 1924)

(204 N. Y. S. 509)

Record: New York tax law. The State Tax Commission assessed an income tax against a corporation. This was affirmed on writ of certiorari.

Facts: The income in question was received during a period of fourteen months, beginning January 1, 1921. The lengthening beyond twelve months resulted from a change to a fiscal year. The entire net income subject to tax in the State is ''presumably'' the same as the entire net income reported to the Federal government, but section 214 of the State law makes the return to the Federal government subject ''to any correction thereof for fraud, evasion or error, as ascertained by the State Tax Commission.'' The Federal statute provides for a deduction of ''all the ordinary and necessary expenses * * *, including a reasonable allowance for salaries or other compensation for personal services *actually* rendered.'' For this fourteen months' period the president of the company was credited with a salary of $40,000, from which the State Tax Commission eliminated $28,000, allowing $12,000.

Hugo Jaeckel established a business of trading in fur garments and, as his sons grew up, three of them went into the busi-

ness with him and became experts. By reason of his advancing years, a corporation was formed in 1916. The father was made president; one son a vice-president, with entire charge of the manufacturing and management of the finances; another son was made vice-president, with supervision of sales; another son was made treasurer, having charge of the purchase of raw materials; and another son, a lawyer, not engaged in the business, was made secretary at a small salary. The father and these four sons were directors. A very large volume of business was done during the entire period after incorporation, and very large salaries were paid. The president was 75 years of age and gave approximately one day a week to the business.

"No facts are shown to prove the value of his services. In the return involved here, his compensation for the fourteen months has been fixed at $39,666, which is said to represent a salary of $35,000 for the year 1921 and two months' salary in 1922 at the rate of a reduced salary of $28,000. The entire net income given by the company for the fourteen months' period was $43,917.50. The amount deducted for salaries was $127,833, of which about $118,000 was for the father and his three sons, who were actively engaged in the business. This $118,000 represents a distribution in salaries to executives alone of 6 per cent on the gross volume of business done." Evidence as to competitors showed in one case, with a business of $1,500,000, 3½% thereof devoted to salaries; and in another case, with a business of $3,250,000, 2½% thereof devoted to salaries.

Question: Was the State Tax Commission justified in reducing the allowance for the president's salary?

Decision: "The commission seems to have reached a correct result. One of the sons was the acting general manager, and had entire charge of the manufacturing and finances, and had been with the business for 27 years. He received about $100 a day for his services, while the president worked about one day a week and received about $600 a day. The salary which the commission has allowed as a proper deduction for the president was about $12,000 for the 60 days of work in the 14 months, which would give him about $200 a day. The business, therefore, had

a competent general manager, and each department was managed by a son who was expert in his particular line. It may well be that the sons were not overpaid, and the commission has so found. One of them had been recently offered $50,000 a year in another house, and another of them had been offered $30,000 a year, with additional compensation. It may well be that one of the reasons for giving them additional compensation at the end of the year was to recognize the value of their services, which would not have been accomplished by simply declaring a dividend on the common stock held by the father and his sons. A dividend would have given them $17,000 each out of the $118,000 distributed to all of them as salaries. Such a dividend would have given the father $66,500, instead of $39,666. But the amount of money which the father would have received and did receive is not the important consideration. It was the manner in which it was received, whether for services or in lieu of a dividend for the purpose of evading taxation.

"We must assume, as the commission did, that the sons were worth to the business about $25,000 a year each, and were not overpaid."

The determination of the commission was confirmed.

PEOPLE ex rel. KLIPSTEIN & CO. v. ROBERTS

(N. Y. Supreme Court, App. Div. 3rd Dept., January 11, 1899)
(55 N. Y. S. 950)

Record: Chapter 542, New York Laws of 1880 and amendments; chapter 908, New York Laws of 1896, and section 10, article 1, U. S. Constitution. Relator petitioned the state comptroller to revise and readjust an account for taxes. Refused. Writ of certiorari. Determination of the comptroller affirmed. (On appeal, this case was affirmed, "without expressing an opinion as to the result had the relator's business been wholly that of foreign or interstate commerce." 167 N. Y. 617.)

Facts: The taxes were for the three years ending November 1, 1896. Relator was a New Jersey corporation, with a paid-up capital stock of $200,000, dealing in chemicals and dye stuffs. 6/7 of its business consisted in selling imported goods in the original

packages; 1/7 in selling imported goods and domestic goods in broken packages. The relator charged that 6/7 of its business consisted in foreign commerce, which could not be taxed by the state because of section 10 of article 1 of the U. S. Constitution.

Question: Was the state tax properly assessed?

Decision: "If the relator's business had been wholly that of foreign or interstate commerce, it doubtless would be entitled to the exemption it seeks unless the fact that it conducted a strictly private business, and not a business of a quasi public character, like that of a common carrier, would exclude it from the protection accorded to the relator in the case cited. But as this relator is engaged partly in domestic or intra-state commerce, and the power of taxation upon the latter business, and the privilege of doing it when carried on within this state by a foreign corporation, are within the competency of the state, and thus the power to prescribe the basis of its measurement is also within its competency, it follows that the statutes imposing and measuring the tax must be considered, as they may be, as not transcending the legislative power of the state."

The court quoted a decision of the U. S. Supreme Court: "From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

PEOPLE v. JERSAWIT
IN RE AJAX DRESS COMPANY

(U. S. Supreme Court, January 7, 1924)
(263 U. S. 493)

Record: Section 209 of the Tax Laws of New York, and the Bankruptcy Act. Claim in bankruptcy by New York for a franchise tax and penalty. The tax was apportioned to the part of the year in which the corporation exercised the franchise, and the penalty was not allowed, but 6% interest was allowed. This was affirmed by the Circuit Court of Appeals (290 Fed. 950). Reversed on writ of certiorari.

Facts: On December 22, 1890, a petition in bankruptcy was filed against Ajax Dress Company, a New York corporation, and it was later adjudged a bankrupt. The State filed a claim for a franchise tax for the fiscal year beginning November 1, 1920, and for penal interest under the tax law of New York. The company ceased business on the date the petition was filed, and the courts below held the tax to be apportioned to the time the franchise was exercised. The New York law requires the tax to be paid on or before January 1. If not paid then the corporation has 10% of the tax added, plus 1% for each month the tax remains unpaid. The courts below held this to be a penalty, but allowed 6% upon the apportioned amount to the date of payment.

Question: Should the claim in bankruptcy for the New York franchise tax be apportioned to the time the franchise was exercised and should the penalty and interest be allowed?

Decision: The amount of the tax under the New York statute "is not determined by the business done during the period taxed but by the net income of the year before. * * * It hardly can be supposed that if the tax had been paid the State would recognize a claim for a proportionate return. We are of opinion that the tax is a tax upon the right conferred, not upon the actual exercise of it, that it was due when the petition in bankruptcy was filed, New Jersey v. Anderson, 203 U. S. 483, 494, and that the claim of the State for the whole sum should have been allowed."

The additional 10% was disallowed as a penalty and the 1% a month was held to be more than the value of the use of the money, and 6% interest was allowed.

PHILADELPHIA CITY PASSENGER RAILWAY CO. et al. v. PHILADELPHIA RAPID TRANSIT CO.

(Pennsylvania Supreme Court, 1919)
(263 Pa. 561)

Record: Revenue Act of September 8, 1916, as amended by the Act of October 3, 1917. Assumpsit to recover amount of Federal income tax and excess profits tax assessed against plaintiffs, based upon covenants of a lease. Judgment for plaintiffs. Appeal. Affirmed.

Facts: This case and eight others were argued on appeal with but a single question involved. The lower court in one of these cases, Ridge Avenue Passenger Ry. v. Philadelphia Rapid Transit Co., stated that the covenant in the lease required the defendant to "pay all taxes, charges and assessments now or hereafter lawfully imposed upon Ridge Avenue [the plaintiff] or for which Ridge Avenue would otherwise in anywise be liable or chargeable on account of its * * * earnings * * * or profits." At the time these leases were executed the Federal tax laws above referred to were not in existence.

Question: Did the lease require the lessee to repay the lessor for its payment of the Federal income and excess profits tax?

Decision: The judgment in each of the nine cases was affirmed on the opinion of the court below. That court said: "So far as the covenant under consideration is concerned, we think it amply sufficient to cover both the income tax and the excess profits tax, in view of the fact that any taxes assessed upon the earnings or profits of the plaintiff were to be paid by the defendant. The plaintiff having turned over all its property to the defendant, the only earnings or profits it can receive are from the lease, and whether the tax be imposed upon income, net or gross, it is in fact imposed upon the rental."

PITNEY et al. v. DUFFY, COLLECTOR
PITNEY et al. v. FERGUSON, COLLECTOR
(U. S. District Court, D. New Jersey, June 30, 1923)
(291 Fed. 621)

Record: Acts of 1917 and 1918. Two suits by executors to recover amounts paid as additional income taxes. Judgment for plaintiffs in both suits. (Affirmed by Circuit Court of Appeals.)

Facts: One suit involved an additional tax assessed for 1917, and the other involved that assessed for 1918.

An increase in the tax for 1917 followed a reduction by the Government of the amount to be allowed as the 1913 value of certain real estate sold by the decedent in 1917 for $8,000. The taxpayer's 1913 valuation was $5,000, and he accounted for a

profit of $3,000 in his return. The Department fixed the 1913 value at $300 and assessed an additional tax.

Contributions made in 1917 and 1918 to a post of the Grand Army of the Republic were held by the Government not to be contributions to a charitable use and therefore not proper deductions.

Additional taxes were also assessed on the alleged receipt by the decedent as income of the 2% normal tax paid by debtor corporations on tax-free covenant bonds held by the taxpayer in 1917 and 1918.

Questions: (1) What was the 1913 value of the land?

(2) Was the G. A. R. post in question a corporation organized and operated exclusively for charitable purposes?

(3) Is a 2% normal tax paid by the debtor corporation on tax-free covenant bonds income to the holder under the Acts of 1917 and 1918?

Decision: (1) The 1913 value of the land was $5,000. In 1913 the city of Newark assessed the land at some $1,200. "In 1917 the assessed value was some 2,000. The ratio between the assessed value in 1917 and 1913 is similar to the ratio between the $8,000 actually received [by the taxpayer from the sale] * * * and the 1913 value of $5,000 fixed by him. Further than this, the testimony of real estate experts indicates that the 1913 valuation was proper." The sale price exceeded the Government figure by over 2,500 per cent. Clearly no real estate in Newark could increase in value that much during that time, nor is any reason assigned for the Government's action in selecting a valuation 25% of a city assessment.

(2) As the G. A. R. post was organized as a charitable corporation and has used its funds exclusively in alleviating the needs of its members, who are Civil War veterans, the contributions to it were clearly deductible.

(3) "The 2% tax paid by the debtor corporation on tax-free covenant bonds is not income in the hands of the obligee." The Government holds that such payments are in the nature of additional interest paid to the bondholders. "Obviously this is pure

fiction, for that which the bondholder never received cannot be regarded as falling within the definition of income as contained in either of the acts in question. * * *''

"'Income' means that which has come in, just as expenditures mean what has been paid out or goes out.''

POOL v. WALSH, COLLECTOR

(U. S. Circuit Court of Appeals, Ninth Cir., August 7, 1922)
(282 Fed. 620)

Record: Suit for injunction to restrain a collector from selling property which the plaintiff claimed belonged to her and not to the taxpayer. From an order dismissing the suit plaintiff appealed. Reversed.

Facts: Plaintiff claimed that she owned certain certificates of deposit and that the collector was threatening to sell them to satisfy a tax claim against her husband. The proceedings were based upon assessment of taxes under Section 35 of the National Prohibition Act.

Question: Was the tax assessed under National Prohibition Act, Section 35, a penalty, and does an injunction lie to restrain the threatened enforcement of the penalty?

Decision: The court held that the assessment under Section 35 lacked all the ordinary characteristics of a tax and involved the idea of "punishment for infraction of the law, the definite function of a penalty.'' It was held that Revised Statute, Section 3224, was not applicable. "In the present case the executive officers threaten to sell the sole property of the plaintiff to pay a penalty by way of punishment imposed upon another person, her husband, and to do this without bringing any action against plaintiff to establish her liability. * * * such a course would be violative of plaintiff's rights'' and an injunction should issue.

POWERS v. DETROIT, GRAND HAVEN & MILWAUKEE RY. CO.

(U. S. Supreme Court, April 16, 1904)
(201 U. S. 543)

Record: Michigan Tax Act of 1901. Alleged contract clause in the special charter of a corporation. Suit in United States

Circuit Court attacking the validity of the Michigan Tax law, and involving the existence and scope of an alleged contract in the charter of a corporation as to taxation. Such a contract was held to exist, preventing further taxation. Appeal. Affirmed.

Facts: The Detroit & Pontiac R. R. Co. was chartered by Michigan, March 7, 1834, and the Oakland & Ottawa R. R. Co., April 3, 1848. By an act of February 13, 1855, the former was authorized to change its name to Detroit & Milwaukee R. R. Co. and to purchase the roads, property and franchises of the Oakland Company, the act providing, in section 9, that the company should pay an annual tax of 1% on its capital stock paid in, "which shall be in lieu of all other taxes" except certain penalties. Since 1850 the State constitution provided that all laws passed pursuant thereto "may be amended, altered or repealed," but that any act of incorporation theretofore passed should not be altered or amended without the assent of two-thirds of the members elected to each house. Certain mortgages were foreclosed on the road and the company was reorganized twice, finally under the name of the defendant in error. The circuit court held that said section 9 created a contract which prevented the enforcement of the railroad tax law (138 Fed. 264) and the case was appealed to the Supreme Court.

Question: Did the charter clause constitute a contract between the State and the corporation, preventing State taxation further than that therein specified?

Decision: The Michigan Supreme Court had decided in Attorney General v. Joy, 55 Mich. 94, that no new corporation had been formed in the reorganizations. The United States Supreme Court will accept a decision of the State Supreme Court as to the validity of a statute claimed to create a contract between the State and a corporation. The decision in the Michigan case cited shows there was ample consideration for a contract, if a consideration were necessary. The court quoted from Home of the Friendless v. Rouse, 8 Wall. 430:

"There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature

to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it.''

It was contended that the contract alleged was one relating to property of the stockholders and not the property of the corporation. ''By section 9 the tax is 'on the capital stock of said company paid in.' Clearly that refers to the property which the corporation has received and presumably holds. It is not the individual property of the shareholders, which is contemplated, but that which is in the treasury of the corporation, or included among its assets. * * * Under those circumstances we are of the opinion that the tax provided for by section 9 is a tax upon the property of the corporation, and not a tax upon the shares of stock held by the shareholders. There was, therefore, a contract between the State and the corporation which prevented the subjection of the property of the corporation to any other than the tax prescribed in the statute.''

RAILROAD COMPANY v. ROSE

(U. S. Supreme Court, October, 1877)
(95 U. S. 78)

Record: Act of June 30, 1864, as amended by the Act of July 13, 1866, and the Act of July 14, 1870. Suit by the Lake Shore & Michigan Southern Railway Co. to recover tax which it paid on account of interest on bonds of the company for the six months ended July 1, 1870. Demurrer to the petition was sustained and judgment was given for the defendant. Affirmed on writ of error.

Facts: The interest for that period was paid to the bondholders, and neither 5% nor any other sum was withheld on account of taxes. A tax of 5% was assessed thereon and payment was compelled by seizure of the property. The tax was alleged to have been exacted without warrant of law, and suit was brought for its recovery.

Question: Was the tax properly assessed?

Decision: The last amendment continued Section 122 and other sections of the original act until August 1, 1870, the taxes

imposed by all those sections then to cease. That section levied a tax on railroads, etc., but did not include the tax on individuals, which was provided for in other sections. The court expressed the opinion that said section 122 was not affected in any way by the amendatory act of 1867, which applied only to the taxes against individuals, but said that even if it were in error, it was clear that the 17th section of the Act of 1870 revived the sections therein named, including section 122, "and gave them the same effect down to the first of August, 1870, in all respects as if those sections had not been intermediately suspended or abrogated."

RAILROAD COMPANY v. UNITED STATES

(U. S. Supreme Court, October, 1879)

(101 U. S. 543)

Record: Sections 951 and 3220, R. S.; Act of July 13, 1866, and Act of 1870. Action by the United States against the Western Union Railroad Company for internal revenue taxes. Judgment for the plaintiff. Writ of error. Affirmed in part and reversed in part.

Facts: This was an action by the United States for taxes alleged to have accrued from August 1, 1862, to December 31, 1871. The trial court was of the opinion that such a tax was not owing, as no such interest had ever been paid, but inasmuch as the company had paid the tax, no credit therefor could be allowed in this suit. A part of the tax was assessed under the provision for such a tax upon railroads transporting the mails under contract. There was no evidence of an express contract of this kind, but it was admitted that the gross receipts of the company "for fares and carrying the mails from August 1, 1866, until January 1, 1870, were $605,770.09, and that of the said last amount $61,-676.01 were for carrying the mails, and $544,094.08 for fares." Evidence was adduced as to certain payments after August 1, 1871, of interest which became due and payable at that time. Against objections of immateriality, plaintiff proved that a certain sum of interest became due and payable on the company's bonds February 1, 1872, and that it was paid on or after that date.

Questions: (1) Should the company be allowed credit for money paid by it for another tax which had been erroneously assessed and collected?

(2) Might a contract for transporting the mails be assumed in the absence of proof of an express contract, so as to render the company liable to tax therefor?

(3) Should the rate of taxation on interest on the bonds of the company be reduced from 5% to 2½% as to payments after August 1, 1870?

(4) Was the company liable, under the Act of 1870, for taxes on interest not due nor payable until 1872?

Decision: (1) Section 951, R. S., provides that in suits brought by the United States, no credits shall be allowed except such as have been presented to the Treasury officials for their examination and have been disallowed in whole or in part, Section 3220, R. S., authorizing the Commissioner to refund taxes wrongfully collected. As this claim had never been so presented, "notwithstanding its apparent equity, the credit was properly refused in this suit."

(2) The Act of July 13, 1866, as amended, provided that railroads transporting mails upon contracts made before August 1, 1866, should pay a tax of 2½% of the gross receipts. "No express contract for carrying the mails was proven, but since the service for which the compensation was paid began before August 1, and was continued without interruption for the whole term in question, the court below implied a contract prior to that time. This, we think, was right."

(3) The decision of the lower court that the rate of taxation in question was 5% and not 2½% was affirmed as in accordance with the prior decisions in Stockdale v. Insurance Companies, 20 Wall. 323, and Railroad Company v. Rose, 95 U. S. 78 (ante).

(4) The Act of 1870 provided for tax during the year 1871 of 2½% on interest paid by a railroad company and on dividends of earnings, etc., whenever and wherever payable and on all undivided profits. "The interest in this case was neither payable nor paid in 1871, and as the tax is not leviable or collectible

until the interest is payable, we see no way in which the company can be charged on this account. The tax is not on the interest as it accrues, but when it is paid." As the interest was not payable in that year, "the tax is not demandable either in whole or in part."

RANSOME CONCRETE MACHINERY CO. v. MOODY

(U. S. Circuit Court of Appeals, 2d Cir., March 20, 1922)
(282 Fed. 29)

Record: Suit brought by the company against Moody to set aside an alleged contract of employment, with counter-claim by defendant for breach of contract. Decree for defendant. Appeal and writ of error. Decree confirmed and writ of error dismissed.

Facts: The directors of the company entered into a contract with one of their number for increased compensation as manager. There was some question as to their right to make this contract, but that question was decided affirmatively. The manager was employed at a salary of $10,000 a year and percentages of the net profits, varying with the amount of the profits. Before the termination of the contract, the company dispensed with Moody's services and brought this suit to set aside the contract, in which he presented his counter-claim.

A question arose as to the amount of the commissions. The court held the contract binding and gave judgment for Moody.

Question: In determining the net profits of a corporation, a percentage of which was to be paid the manager as a part of his compensation, should excess profits tax and income tax be first deducted?

Decision: In the opinion of the District Court, in which the Circuit Court of Appeals concurred, it is said:

"I agree with the reasoning of Patent, etc., Syndicate v. Etherington (1919) 1 Ch. 306, in respect of excess profits tax. As to the national income tax I express no opinion, because after reflection the whole amount involved is too small to affect results. The point is very perplexing, as I am firmly of opinion that no well-advised employer would use the phrase 'net profits' so that

a servant, in receipt of commission, would be sure of his share of what the agreement called 'profits,' and yet, after paying the so-called income tax, the employer would have no profits left.

"On the other hand, contemporary exposition is always of great importance, and it is in evidence that Moody was paid his share of net profits for 1919 before the deduction of any income tax, and such payment was treated in the return as an expense of the business, which in one sense it certainly was. This procedure was in accord with the intimation of Bennett v. Millville, etc., Co., 67 N. J. Law, at page 323, 51 Atl. 706. In short, it does not seem to me that solution of this problem is necessary in this case; but I admit being influenced in respect of the quantity of Moody's recovery by what I conceive to be the plain intention of the parties, however difficult it may be to work out such intention."

(In Patent Castings Syndicate, Limited, v. Etherington, 1 Ch. 306, 1919, ante, it was held that the net profits of the company, a percentage of which was to be paid the manager as a commission, could only be arrived at after deducting the express profits tax.)

RAY CONSOLIDATED COPPER CO. v. UNITED STATES

(U. S. Court of Claims, May 19, 1924)
(Not yet reported)

Record: Section 1,000, Revenue Act of 1918. Suit to recover a capital stock tax paid. Petition dismissed.

Facts: Plaintiff, a Maine corporation, was engaged in mining, milling and smelting copper ore. Its capital stock tax return disclosed the average sale value of its common stock traded in on the New York market in 1919 to be $22.067 a share. This made the total value of all the shares issued and outstanding $34,803,-608.99. This was claimed by the company to be "the fair average value of its capital stock for the preceding year." It enclosed its check in payment of the tax based upon this amount.

The Commissioner assessed and collected the tax on the basis of the net assets of the corporation, giving full credit to all the evaluation estimates of the company with respect to its property except one, being a copper mine in Arizona, the principal asset

of the corporation. The corporation valued this at about eight million dollars; the Commissioner at about thirty-two million dollars. The Commissioner's valuation was based upon a former return of the corporation made for the purpose of ascertaining income tax, in which the value was placed at over one hundred and twenty-seven million dollars. Subsequently a depletion allowance of the Commissioner, satisfactory to the corporation, reduced the value to over ninety-three million dollars and on December 31, 1919, the Commissioner finally fixed the value at about the thirty-two million dollars mentioned. The corporation does not question the accuracy of this computation but the challenge is as to the method employed. The additional tax, amounting to about $21,000 was paid under protest and a petition for its return was filed in this case. The corporation insisted that the fair average value of its shares of stock shall be based upon bona fide transactions on a large scale in the open market. The defendant insisted that the term "capital stock," as used in the Act, had no such restricted meaning; that the tax was on the privilege of conducting business, the value of which was ascertainable from the net value of its holdings, its possessions and capital stock from which earnings and dividend are expected to flow; and that it was the intention of Congress to tax "the entire potentiality of the corporation to profit by the exercise of its corporate franchise."

Question: What is the proper basis for the valuation of capital stock in assessing the capital stock tax?

Decision: The court referred to the flexibility of the meaning of the term "capital stock" in both the courts and the financial world and said that almost uniformly in the state courts "in the imposition of property taxes laid upon the capital stock of corporations the term is held to mean the assets of the corporation, its real possessions which the corporation uses and employs in its corporate activities." In the Act of June 13, 1898, and the amendatory Act of October 22, 1914, imposing a special excise tax on the banking business, the value was arrived at on the basis of the capital, surplus and undivided profits, including the entire net assets of the bank. In 1916 this excise tax was extended to all corporations, the Act providing that in estimating the value

of the capital stock "the surplus and undivided profits shall be included." The Act of 1918 contains this provision.

"An analysis of this legislation, considered in the light of its inception, as appears from the bankers taxing statute, clearly imports a legislative policy to measure the excise taxes provided for on the basis of the assets of the corporation. It was not until 1916, when the field was broadened and all domestic corporations came within the scope of the capital stock tax law, that doubt in this respect could possibly arise."

The court cited the case of Central Union Trust Co. v. Edwards, 282 Fed. 1008 (ante 860) and the affirming opinion in 287 Fed. 324 (ante in this volume) in which the value on the market was greater than the value as shown by the assets and the larger value was taken without limiting the computation to net assets, but including all the factors, both tangible and intangible, which went to make up the value as a going business. The court said it was of the opinion that Congress, in this statute, "was endeavoring in the use of the term 'fair average value of the capital stock' to formulate a basis for the computation of the tax that would allow the commissioner in its assessment to take into consideration the resources of the corporation, its assets and liabilities, its entire possessions actually at work to produce earnings, the instrumentalities available to its management as a going concern, and, from the sum total thus ascertained, strike a fair average value, a value fair to the corporation and to the Government."

"We had prepared and were just on the point of announcing the opinion in this case when the opinion of the Supreme Court in Hecht v. Malley [265 U. S. 144, ante] reached the court. The Hecht case, decided May 12, 1924, we think, disposes of this one."

REGAL DRUG CORPORATION v. WARDELL, COLLECTOR

(U. S. Supreme Court, December 11, 1922)
(260 U. S. 386)

Record: Section 3224, Revised Statutes; Section 35, National Prohibition Act. Bill to enjoin collector from taking or continuing possession of complainant's property and from enforcing col-

lection of taxes, etc., upon liquors. Demurrer on the ground of adequate remedy at law was sustained by the District Court and the order of dismissal of the suit was affirmed on appeal (273 Fed. 182, ante 426). Brought to the Supreme Court by writ of certiorari. Reversed and remanded.

Facts: Complainant is a California corporation. On October 28, 1919, and until June, 1920, complainant was the holder of a permit to sell liquors for non-beverage purposes. During that time complainant purchased certain liquors, paid the taxes thereon and complied with the provisions of the National Prohibition Act, etc. The Commissioner levied against him a so-called tax upon certain distilled liquors, and upon certain sweet and dry wine. These were fines and penalties imposed on complainant without notice or a hearing. The Commissioner also levied against complainant without notice or hearing penalties for selling liquor and for conducting the business of a rectifier and for having manufactured spirits or liquors, all in violation of law. The Commissioner took possession of complainant's drug store and the stock of goods therein, excluding complainant therefrom, and proceeded to sell same in order to satisfy the so-called tax and penalties. The District Court said it would grant the injunction but for Section 3224, Revised Statutes, and expressed a doubt as to the validity of the tax, but denied the injunction and dismissed the suit. The Circuit Court of Appeals affirmed the decree.

Question: Does Section 35 of the National Prohibition Act authorize the Collector to impose such a fine and penalty for an alleged criminal offense without notice or hearing, and may his action be enjoined, notwithstanding Section 3224, Revised Statutes?

Decision: The court based its decision on and referred to the case of Lipke v. Lederer, 259 U. S. 557 (ante 924), saying:

"The function of a tax * * * 'is to provide for the support of the government;' the function of a penalty clearly involves the 'idea of punishment for infringement of the law;' and that a condition of its imposition is notice and hearing. * * * And even if the imposition may be considered a tax, if it have

punitive purpose, it must be preceded by opportunity to contest its validity.''

''The comment and decision are applicable here and decisive. The Government concedes that the case is conclusive against the 'penalty and double taxes' but contends that under tax laws which antedated the National Prohibition Act, only inconsistent laws are repealed, and that taxes in this case were levied under a law not inconsistent. For this section 35 is adduced. Lipke v. Lederer manifestly precludes the contention.

''The contention encounters, besides, the averments of the bill. They assert that all taxes that were or could be levied were paid by complainant, and that those against which the bill is directed were imposed without notice or hearing as penalties for criminal violations of the law. The facts are not denied. They impel the application of Lipke v. Lederer and the reversal of the action of the District Court and that of the Circuit Court of Appeals.''

REPUBLIC BUILDING v. GAERTNER

(Court of Appeals of Kentucky, November 27, 1923. Rehearing denied January 29, 1924)

(256 S. W. 1111)

Record: Action by Gaertner against the Republic Building to recover the amount he had paid as income taxes upon the receipts of rent from property leased to the Republic Building. Judgment for plaintiff. Defendant appealed. Affirmed.

Facts: A lease provided that the lessees should pay all taxes and assessments upon the leased premises and the income from said premises and that if the lessor was required to pay such taxes the lessees should make reimbursement, ''it being the intent of the parties that the lessor shall receive the aforesaid rentals net and free from any sort of tax or deduction.'' The lessor claimed that this included income taxes due the United States upon the rent accruing. The Republic Building, a corporation, contended that it did not include the rents, as they were not referred to in the lease as income but always as rent.

Question: Are the provisions of the lease sufficiently broad to include income taxes due the United States upon such rents?

Decision: After referring to the clause quoted above, the court said: "This latter clause no doubt was intended to make absolutely certain that which was reasonably certain from other words in the same paragraph of the contract; that is, that the lessee was to pay all taxes on the property, as well as all assessments for street improvements, and all taxes or assessment on income giving the lessor the sums named as net rentals. In fact the contract required the lessee to pay every kind of tax or assessments 'whatsoever.'"

As Gaertner had paid the past due income taxes upon the receipts of rent before the commencement of the action, which sum was owing him by the corporation, he was held entitled to recover the same from the Republic Building.

RETZER v. WOOD, COLLECTOR

(U. S. Supreme Court, November 12, 1883)
(109 U. S. 185)

Record: Section 104, Act of June 30, 1864, and Section 44, Act of June 6, 1872. Suit in state court for recovery of taxes paid. Removed by defendant by certiorari to U. S. Circuit Court. General issue. Judgment for defendant. Writ of error. Reversed.

Facts: Retzer, in 1866, 1867 and 1868, had been required to pay a tax of 3 per cent on the gross amount of the receipts of his business, on the ground that he was engaged in the express business. The suit was commenced June 2, 1874. Retzer carried goods between New York and Brooklyn and from one place to another in Brooklyn, but did not run regular trips nor over regular routes or ferries. On May 28, 1873, he presented a claim to the Commissioner for the refund of the taxes in question. No decision was ever made on that claim. The lower court found that the tax was illegally collected but that action was barred by the limitation and judgment was rendered for defendant. No evidence was offered by the defendant and the statute of limitation was not pleaded.

Question: Was the plaintiff liable to tax as conducting an express business, and, if not, could he recover the amounts paid after the time of the statute of limitation had expired?

Decision: "We are of the opinion that the plaintiff was not liable to this tax, because he did not carry on or do an express business, within the meaning of the statute. * * * An 'express business' involves the idea of regularity, as to route or time or both."

"As to the defense of the Statute of Limitations, it was not pleaded, nor brought to the attention of the court, as a defense, at the trial. It was not within the issue raised by the plea of the general issue, which was the only issue to which the stipulation for a trial by the court extended. It is well settled that, in the absence of a contrary rule established by statute, a defendant who desires to avail himself of a statute of limitation as a defense, must raise the question either in pleading, or on the trial, or before judgment."

The court stated that plaintiff was entitled to a judgment in his favor.

RHODE ISLAND HOSPITAL TRUST CO. v. DOUGHTON

(North Carolina Supreme Court, February 27, 1924)
(121 S. E. 741)

Record: North Carolina Inheritance Tax Statute; Article 1, Section 17, North Carolina Constitution, and the 14th amendment to the United States Constitution. Action by the company, as executor, against Doughton, tax commissioner, to recover state inheritance taxes paid. Judgment of nonsuit and plaintiff appeals. Affirmed.

Facts: The tax was because of shares of stock owned by the company's decedent, Briggs, in the R. J. Reynolds Tobacco Company, a New Jersey corporation, domesticated in North Carolina according to its laws, having its principal place of business and two-thirds of its property in the State. The transfer office of the company was in New York, and the certificates representing the shares had never been in North Carolina. Briggs was not a

resident of North Carolina, but resided in and was a citizen of Rhode Island. He died October 29, 1919. None of the beneficiaries under his will lived in North Carolina.

Question: Can the North Carolina legislature impose an inheritance tax upon the right of nonresidents to take by will or the intestate laws of another State from a nonresident decedent or intestate shares of stock in a foreign corporation authorized to do business in the State and having its principal office and two-thirds of its property there?

Decision: The court said that an inheritance tax was levied, not upon the property itself, but upon its transfer. There is a difference of opinion as to whether the tax is on the privilege of transmitting or of receiving property (citing Prentiss v. Eisner, 267 Fed. 16, ante 413), the former called a "transmission" or "legacy tax" and the latter called a "succession" tax. The North Carolina tax is imposed upon the right of succession.

"It is universally conceded that a State may levy an inheritance tax on the transfer by will or devolution of all property within the power of its reach, whether such property be real or personal, tangible or intangible, corporeal or incorporeal. * * * It is equally well established that a State tax on property must be limited to property within the territorial jurisdiction of the State. * * * Undoubtedly the State has power to levy an inheritance tax in respect to all property upon which it has power to impose an ordinary property tax, and, in addition thereto, it has the power to impose a succession tax in respect to certain property upon which it cannot levy an ordinary property tax."

"A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises."

"It has been the policy of the Legislature * * * to treat the interest of a stockholder in a domestic corporation, for purposes of taxation, as identical with that of the corporation; and hence an individual stockholder is not required to list his shares of stock for taxation, where the State has already exercised the right to tax such shares through the corporation itself, or 'at its source,' as it is sometimes called."

The Legislature intended "to impose an inheritance tax upon the transfer by will or devolution of the interests of nonresident stockholders in corporations, chartered in any other State or country, 'when such incorporated company is the owner of property in this State, and if 50 per cent or more of its property is located in this State.' * * * The transfer now under consideration took place certainly by the permission and under the ultimate protection, if not by the direct operation, of our laws. * * * The rights incident to a share of stock in a corporation—to partake of the surplus profits of the corporation, and ultimately, on its dissolution, to participate in the distribution of its assets, after payment of its debts—can be maintained and enforced only in the jurisdiction where the property of the corporation is situated."

"From the foregoing, we conclude: (1) That the defendant and the State Tax Commission have properly construed chapter 90, Public Laws 1919, as imposing the tax now in question; and (2) that the said act is constitutional."

RICHMOND v. BIRD et al.

(U. S. Supreme Court, March 3, 1919)
(249 U. S. 174)

Record: Sections 64a and 67d, Bankruptcy Act of July 1, 1898. Claim for taxes was given priority over a landlord's claim for rent. Reversed in the Circuit Court of Appeals. Writ of certiorari. Circuit Court of Appeals affirmed.

Facts: November 4, 1909, a receiver was appointed for the Ainslie Carriage Company. February 3, 1910, it was adjudged bankrupt, in involuntary proceedings instituted November 6, 1909. At the time of the receiver's appointment, taxes for 1907, 1908 and 1909 were due the city of Richmond, for which it had not distrained. Respondents, landlords of the bankrupt, under express statutory authority, levied a distress warrant November 1, 1909, on account of rent due since April 1, 1908.

Question: Which was entitled to priority of payment, the rent or the taxes?

Decision: The court quoted from Sections 64a and 67d of the Bankruptcy Act and said: "It is not denied that respondents obtained a present, valid lien upon the bankrupt's goods and chattels distrained November 1, 1909; nor is it now claimed this was annulled by adjudication of bankruptcy. That the city of Richmond had no lien for past-due taxes upon these goods and chattels when the chancery court receiver took possession, we think must be regarded as settled.

Respondents "must prevail unless priority over their lien is given by section 64a to claim for taxes which, under State law, occupied no better position than one held by a general creditor. Section 67d, Bankruptcy Act, * * * declares that liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, shall not be affected by it. Other provisions must, of course, be construed in view of this positive one. Section 64a directs that taxes be paid in advance of dividends to creditors; and 'dividend,' as commonly used throughout the act, means partial payment to general creditors. In section 65b, for example, the word occurs in contrast to payment of debts which have priority. And as the local laws gave no superior right to the city's unsecured claim for taxes, we are unable to conclude that Congress intended by section 64a to place it ahead of valid lien holders."

ROBERTS v. WEHMEYER

(California Supreme Court, August 17, 1923; Rehearing denied September 13, 1923)
(218 Pac. 22)

Record: Section 172a, California Civil Code.Suit to set aside a deed. Judgment for plaintiff. Appeal. Reversed.

Facts: Plaintiff was the wife of William A. Roberts. On August 21, 1917, they purchased certain land, the deed being taken in the name of the husband alone, but the property was paid for out of community funds, substantially all of which had been accumulated before July 27, 1917, when section 172a of the Civil Code became effective. The wife secured a divorce from the husband February 20, 1920, in an action commenced on Jan-

uary 24, 1920, and she was awarded the real estate in question. On January 23, 1920, the husband executed and delivered to defendant a conveyance of the premises, which was recorded January 29, 1920, in which plaintiff did not join, and received in payment therefor defendant's promissory note, maturing in one year. Defendant knew at the time that Roberts and his wife were occupying the premises as their family home.

She brought suit February 21, 1920, and before the decree of divorce was granted, to have the deed declared void and to have the title declared to be in her, on the ground that the conveyance of community property by a husband is void under the section in question unless the wife joins therein. She secured judgment. Defendant appealed.

Question: Under the facts stated, did the conveyance in which the wife did not join convey the title to the grantee?

Decision: The court quoted section 172 before the amendment, which gave the management and control of community property to the husband, with the like absolute power of disposition as he has to his separate estate, except as to testamentary disposition, gifts, etc. By the amendment, this section was confined to personal property and section 172a was added to provide for the control of community real property, which provided that the wife must join him in conveyances. The court held that vested rights in community property existing before the amendment could not be changed by the transmutation of personal property into real property after the amendment. "For the purpose of determining whether any such right is disturbed, the realty must be regarded as though it had been acquired before the adoption of the section." The legislature may prescribe and change at will regulations as to the method of transferring property, "but such regulations may not contravene the constitutional guaranty that one cannot be deprived of his property without due process of law."

The husband is the owner of the community property and "except for such restrictions as the legislature may have authority to impose, he has the unqualified right to dispose of it and

* * * the wife has but a mere expectancy and not a title or interest which she would convey by joining in the deed. * * * To provide that the husband must now obtain the consent of his wife to transfer realty acquired at a time when no such limitation was imposed on his right of alienation, would deprive him of a vested right. * * * It follows that section 172a can have no application to such a case, and hence does not govern the transfer in the case at bar.''

The court held the deed valid and said that the property involved no longer belonged to the community.

ROBINSON et al. v. LUNDRIGAN

(U. S. Supreme Court, February 3, 1913)
(227 U. S. 173)

Record: Bill as to title to lands. Dismissed. Affirmed in Circuit Court of Appeals. Appeal. Affirmed.

Facts: The case involved the departmental practice in regard to filing application for public lands based on soldiers' claims.

Question: What weight has a Departmental ruling?

Decision: ''Against these rulings complainants urge previous departmental practice. This practice Robinson urged in his petition for review, and cited in support of it the case of Germania Iron Co. v. James, 89 Fed. 811. To the contention and the case the Acting Secretary replied as follows: 'In that case the court held that a just and reasonable rule of administration adopted and applied by the Department became a rule of property, and could not be altered to the prejudice of those who had initiated rights under such practice. But the rule contended for by counsel as governing the case is neither reasonable nor just. * * *'

''Little need be added to this reasoning. We are not disposed to review the cases by which it is contended the practice is established. It could only prevail if it were a reasonable administration of the statute.''

ROSENFELD v. SCOTT, COLLECTOR

(U. S. Circuit Court of Appeals, Ninth Cir., August 6, 1917)
(245 Fed. 646)

Record: War Revenue Act of June 13, 1898. Action to recover taxes paid under protest. Judgment of District Court for the Second Division of the Northern District of California in behalf of the plaintiff (232 Fed. 509) reversed.

Facts: Testator died on May 29, 1902. By his will he provided for the creation of a trust fund for the benefit of his children, the income to be paid by the trustees to the beneficiaries for a period of eleven years. At the end of the period, the trust property remaining on hand was to be distributed in equal shares among the six children. The War Revenue Act of June 13, 1898, was repealed by the Act of April 12, 1902, to take effect July 1, 1902. The Act of June 27, 1902, provided for the refunding to executors or trustees who had paid the tax levied under the Act of June 13, 1898, insofar as said tax may have been collected on contingent beneficial interests which shall not have become "absolutely vested in possession or enjoyment prior to July 1, 1902." On behalf of the collector, it was contended that the vested right of each legatee was an income for life, for the reason that when the period of eleven years passed the legatees would become vested with the corpus of the estate, the equivalent of an income for life.

Question: What was the extent of the estate vested in the beneficiaries prior to July 1, 1902?

Decision: "We must hold that the life estates were contingent beneficial interests and were not vested in possession or enjoyment prior to July 1, 1902, and that there was no authority to assess and collect a tax from the trustees * * * with respect to any right or interest of the legatees in that estate, except the present right to receive the income from the estate for the period of eleven years."

RUTAN, COLLECTOR, v. JOHNSON & JOHNSON
HEROLD, COLLECTOR, v. JOHNSON & JOHNSON

(U. S. Circuit Court of Appeals, Third Cir., March 15, 1916)
(231 Fed. 369)

Record: War Revenue Act of June 13, 1898. Actions by Johnson & Johnson, a corporation, to recover stamp taxes paid. Judgment for plaintiff, and defendant brings error. Affirmed.

Facts: Actions were brought to recover money paid for revenue stamps affixed to certain manufactured articles. The articles stamped were medicinal plasters, papoid powders and tablets and corn and bunion plasters. The taxing Act contained the proviso that no tax should be imposed upon any "compounded medicinal drug or chemical." By stipulation, the cases were sent to a special master to ascertain the amount due. Exceptions to his report were dismissed by the court and judgments were entered for the sums determined by the master.

Question: Are medicinal preparations "compounded" so as to be taxable under the statute where the only thing done is to take away one of the constituents of certain juices?

Decision: As to papoid preparations, which are not covered by these findings of fact, the court said that they were not compounded. "Nature combines the constitutents in the juice of the papaw, and papoid is derived from the juice, not by adding anything effective, but simply by taking something away. What is left, and is sold in the form of powder or tablet, is what nature combined; man having nothing to do with the process. Compounding (as the act used the word) is only possible when two or more substances, previously separate, are put together by human agency to form some kind of union, and no such union has been brought about to produce the substance in question."

SAFE DEPOSIT AND TRUST CO. v. TAIT, COLLECTOR

(U. S. District Court, D. Maryland, December 19, 1923)
(295 Fed. 429)

Record: Revenue Act of 1918, section 402. Suit to recover estate taxes paid. Demurrer of defendant sustained.

Facts: Albert and his wife each conveyed property to plaintiff, the deeds providing that the income therefrom should be paid to the grantor for life, the income from all the property, at the death of either, to be paid to the survivor for life, with certain remainders over. The trust was irrevocable except by joint consent, and the grantee's powers of sale and reinvestment could be exercised only with the approval of both grantors during their joint lives. Albert's deeds were executed in 1911, 1917 and 1918, while the taxing statute was passed in February, 1919. Albert died March 18, 1919. The commissioner included in his estate the property covered by the property conveyed by the deeds mentioned.

Questions: (1) Is the Revenue Act of 1918 unconstitutional because it in terms applies to transfers made before the passage of the Act?

(2) Did the Revenue Act of 1918 apply to tenancies by the entirety created before the passage of the Act so as to include the property in the taxable estate of the grantor, who had conveyed in contemplation of death or to take effect in possession or enjoyment after death?

(3) Did the deeds in question constitute bona fide sales for a fair consideration in money or money's worth, so as to be excepted from the estate tax?

Decision: (1) Shwab v. Doyle, 269 Fed. 321 (ante 451), held the Act of 1916 to apply to prior transfers and "justifies the conclusion in this case that section 402, subd. 'c' of the Act of 1918 is not unconstitutional because it includes transfers or trusts made either before or after the passage of the act."

(2) Although it was held that the deeds in question did not create a tenancy by the entirety, yet the court said: "Since section 402, subd. 'd' subjecting such an interest to the tax, has no clear statement to the effect that it applies to tenancies created before the act, it must be held to apply only to those created after the act."

(3) "The property conveyed by Mr. Albert in 1917 was considerably in excess of the value of that conveyed by Mrs. Albert.

In 1917 and 1918 he conveyed additional property worth $48,-923.87, without pretense of consideration. The transaction was not a sale. It was a family arrangement, for the disposition of the property of husband and wife, for the benefit and protection of themselves and their children, and savored far more of a testamentary distribution than of a bárgain and sale."

SCHOLEY v. REW

(U. S. Supreme Court, October, 1874)
(23 Wall. 331)

Record: Acts of June 30, 1864, and July 13, 1866. Suit by Scholey, a British subject, to recover the amount of a succession tax which Rew, as collector, had collected over Scholey's protest. Judgment to defendant. On writ of error to Circuit Court for the Northern District of New York, the Supreme Court affirmed the judgment.

Facts: One Elwood died in 1863, leaving a widow and three minor children, and a large amount of personal property, besides certain real estate. By will he directed that the residuary estate be divided one-third to his wife and two-thirds to his three children. The following year the acting executor secured orders of court to invest part of the personalty in real estate. In October, 1867, the widow married Scholey, the plaintiff herein, and in 1869 she died, leaving a will by which she gave all the residue of her estate to him. Through accounting and partition proceedings instituted by the sole surviving executor of Elwood's will, Scholey received one-third of the total value of the Elwood estate in personal property. The children received the rest, which included the real estate in which the Elwood executor had invested, this real estate being included in the total valuation used as the basis for the partition. Scholey was assessed 6% on one-third value of this real estate, as a tax on the value of his succession thereto. He paid the tax to the collector only upon compulsion and under protest.

The Act provided a tax on the disposition of real estate by will, etc.

Questions: (1) Was the statute imposing the succession tax unconstitutional because the tax was direct and not apportioned?

(2) Was there a devolution to the plaintiff of title to any real estate, or did the plaintiff become beneficially entitled in possession or expectancy to any real estate or the income thereof so as to subject him to the succession tax?

(3) Was the plaintiff subject to the tax when the devise, he being an alien, was absolutely void under New York laws?

Decision: (1) The court held that the tax imposed under the succession tax laws was not a tax on land and so a direct tax, and therefore need not be apportioned according to the census. It said in part: "* * * the succession or devolution of the real estate is the subject-matter of the tax or duty, or, in other words, it is the right to become the successor of real estate upon the death of the predecessor * * *."

(2) The case fell within the operation of the statute, according to the court, because of "* * * the conceded fact that the testatrix in her lifetime invested the personal property left her by the will of her first husband, or some part of it, in said real estate, and that the plaintiff became entitled to the same or to the income of one-third of the same at her decease, and consequently became liable to pay the succession tax or duty in question * * *."

(3) Scholey was estopped, said the court, from asserting that he is not liable to the tax because the devise to him, being an alien, was void. The estoppel arose from his acts in accepting benefit of the full value of the devise in other property belonging to the same estate. He claimed one-third interest in this real estate, his claim was allowed by the court, and he received its full value. "Except for the purpose of avoiding the tax or duty due to the United States he has always claimed the benefit of the devise and still claims it for every other purpose." Had he disclaimed the devise, the tax would have been collected from the children to whom the real estate then would have gone. It would now be inequitable for the plaintiff to recover the tax.

SCHWAB v. RICHARDSON

(U. S. Supreme Court, November 12, 1923)
(263 U. S. 88)

Record: Fourteenth amendment of the Constitution, section 1. Writ of error to the Supreme Court of California to review a judgment in favor of defendant as Treasurer of California in a suit to recover a tax (188 Cal. 27). Affirmed.

Facts: Oceanic Steamship Company was a California corporation, transporting freight and passengers between San Francisco and Hawaii and certain foreign countries. The State Board of Equalization valued its franchise and assessed a tax thereon under the State law. It was contended that the assessment and levy were void under section 1 of the fourteenth amendment because thereby the company was assessed on property the situs of which was beyond the jurisdiction of the State, and by the State's action an attempt was made to burden interstate and foreign commerce. The Board ascertained the actual or market value of the capital stock, and from such sum it deducted the value of the tangible property in and out of the State, and the sum thus ascertained was held by the Board to be the value of the franchise of the company. It then ascertained the percentage and proportion of the total business of the company transacted in California, and determined the same percentage and proportion of the total franchise value to be the value taxable in the State.

Question: May a State, in taxing the franchises of its corporations, include in the value thereof enhancements derived from interstate or foreign commerce?

Decision: The decisions in cases on this point "have been careful to declare the immunity of interstate commerce from State taxation, but as careful to declare the power of a State to tax values within its borders, though they may get enhancement from the exercise of rights outside of those borders. How intimate and direct such rights must be cannot be pronounced in formula. A State may not burden or interfere with interstate commerce, or tax property outside of its borders; yet, on the other hand, it has a definite sphere of government, which must not be curtailed.

Certainly, it is not restricted to property taxation, nor to any particular form of excises."

The taxation here is upon intangible property. "It is strictly a franchise tax laid on the company because it derives its existence—its right to be—from the State * * *. The State has taxed the right which it granted, and which it was competent to tax * * * and it has been recognized that its—the franchise's—value may be constituted of its employment in interstate commerce, and have measurement in the property which is its instrumentality." The cases which were cited in the opinion "establish that the method pursued by the Board was not illegally oppressive to interstate commerce or beyond the jurisdictional power of the State." The judgment was affirmed.

SCHWEIZER v. MAGER, FORMERLY COLLECTOR

(U. S. District Court, N. D. Illinois, E. D., February 29, 1924)
(297 Fed. 334)

Record: Revenue Act of 1918, section 1001. Suit to recover taxes. Demurrer to declaration sustained.

Facts: Plaintiff alleges his business is receiving farm produce for sale on commission, advancing all necessary charges thereon and selling same in his own name, deducting advancements and commissions from the proceeds and remitting the remainder to the consignor, and that he paid the Federal income taxes assessed under section 1001 and now seeks to recover same as being illegally assessed. Plaintiff claims that, because he receives the property and sells in his own name, he is a factor and not a broker, and not subject to the tax.

Question: Is one who receives property into his possession and sells same in his own name, remitting the proceeds to the consignor after deducting charges and his commissions, taxable as a broker under section 1001 of the Revenue Act of 1918?

Decision: "But Congress does not limit the tax to ordinary brokers; it expressly provides that 'every person whose business it is to negotiate sales * * * of produce or merchandise for others shall be regarded as a broker.' Congress has defined the word by a new definition all its own. It has not said that all

people included within the ordinary definition of broker shall be taxed, but has extended the term to include all who buy or sell merchandise for others. The act is remedial in character and to be construed liberally. (Cliquot's Champagne, 3 Wall. 114.) The statutory definition must control, and there being no ambiguity the question of what or who was to be included is to be determined from the words used. (Lau Ow Bew v. United States, 144 U. S. 47-59.) Where Congress expressly defines words that definition must govern the courts."

As Congress reenacted this section in the 1921 Act and as said section had received a construction by the Department, taxing such persons as brokers, Congress must be deemed to have approved and adopted such construction.

SEAMAN v. BOWERS, COLLECTOR

(U. S. Circuit Court of Appeals, Second Circuit, March 17, 1924)
(297 Fed. 371)

Record: Section 3224, R. S. Bill for injunction against collector to restrain him from proceeding to collect income tax. Denied. Appeal. Affirmed.

Facts: Seaman made his return on February 22, 1917, of 1916 income, which he filed with the collector on February 28, 1917, and paid the tax shown thereby. The complaint alleged that the return was not false nor fraudulent nor was it made with intent to evade the tax, and no claim to the contrary had ever been made, but that the Commissioner asserted that the return was erroneous and that Seaman was liable for an additional tax, which, with interest and penalties, amounted to over $54,000; that on or about November 21, 1922, Bowers caused to be issued a warrant for distraint; that the collector acted without warrant of law, one of the grounds cited therefor being "that no suit or proceeding for the collection of the alleged additional tax due was begun before the expiration of five years after the date when complainant's return was filed, and that the said Commissioner and the complainant have not consented in writing to a later de-

termination, assessment and collection thereof;'' that the collector threatened to levy, and that Seaman had no adequate remedy at law.

Question: May the court enjoin the collection of an income tax, where the period of limitation has expired?

Decision: The court quoted section 3224, R. S., and referred to the case of Graham v. DuPont, 262 U. S. 254 (ante) and other cases; and said that the affidavits filed disclosed the fact that the return in question was false, and that ''the word 'false,' as used in these tax statutes, is of a technical character and means incorrect, and is not to be construed as meaning intentionally or fraudulently erroneous, but as 'not true' or the equivalent of 'incorrect.' ''

''It is contended by counsel for the United States that 'proceeding,' like 'suit,' means some action or proceeding in court as distinguished from executive action, such as has been undertaken here by the collector.''

''Cases are cited by both sides as to the meaning of the word 'proceeding' in various connections and counsel for the collector invokes the principle of ejusdem generis in support of the argument, in effect, that 'suit' and 'proceeding' mean the same thing.''

''We think it unnecessary to go beyond the statute to ascertain the meaning of 'proceeding.' In our view, it was clearly the legislative intent to set up the statutory limitation against the collection of the tax whether by administrative action or by law suit.''

'' 'Suit' or 'proceeding,' when used throughout this section of the statute, manifestly have the same meaning.''

The court said that it was ''open to appellant, upon compliance with statutory procedure, to present his contentions in respect of the statutory bar when and if he pays the tax or when and if the tax shall be collected.''

The decree of the court below, denying the injunction, was affirmed.

SEAMAN v. GUARANTY TRUST CO., BOWERS, COLLECTOR, et al.

(U. S. District Court, S. D. New York, June 7, 1924)
(Not yet reported)

Record: Section 250 (d), Revenue Act of 1921. Bill to enjoin the Guaranty Trust Co. and others of the defendants from delivering collateral securing Seaman's loans, to the Collector, Bowers, who had attempted to seize such collateral under distraint for an unpaid income tax of Seaman for 1916. Motion for preliminary injunction denied and suit dismissed as to the collector.

Facts: No claim was made by the government that Seaman's return was fraudulent. He insisted "that the warrant of distraint is void because the tax and all suits and proceedings whether departmental or otherwise are barred by the five-year statute. The Collector replies that irrespective of whether the tax is finally due, it has been assessed and his operations in collecting it by distraint are not affected, because of the provisions of section 3224 of the Revised Statutes that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' "

Question: Should the injunction issue?

Decision: "This court has already under the authority of Graham v. DuPont, 262 U. S. 254 [ante], dismissed a suit by this complainant to restrain the collection of this very tax and its action has been affirmed by the Court of Appeals. The words of Judge Mayer's opinion upon the appeal that this complainant 'might present his contentions in respect of the statutory bar when and if he pays the tax or when and if the tax shall be collected' seem to point to an action at law to recover the tax as the only remedy. In view of the authorities I cannot hold that any interference by injunctive process with the attempt of the Collector to seize complainant's securities is permissible. * * * I am not suggesting that the seizure by the Collector is not a trespass upon the rights of the complainant, but however that may be the latter has a remedy or remedies at law to which under the decisions he seems to be confined."

SHAFFER v. HOWARD et al.

(U. S. Supreme Court, March 10, 1919)
(249 U. S. 200)

Record: Oklahoma Income Tax Act. Bill to enjoin enforcing of a tax on the ground that it is repugnant to the U. S. Constitution. The court refused an injunction and dismissed the bill (250 Fed. 873, ante 444). Appeal. Reversed and remanded with directions to dismiss the bill for want of proper parties.

Facts: The term of office of defendants had expired and their successors had qualified, and there was no law of Oklahoma authorizing a revival against the successors.

Question: Did the court have authority to further consider the case?

Decision: The court said that the case had become merely moot, and that it had no authority to further consider or dispose of it.

SHERIDAN v. ALLEN et al.

(U. S. Circuit Court of Appeals, Eighth Cir., April 27, 1907)
(153 Fed. 568)

Record: Sections 934 and 3224, Revised Statutes. Joint petition filed in the Circuit Court for the Eastern District of Missouri for an order to surrender property (145 Fed. 963). Defendant's demurrer overruled. Writ of error. Reversed.

Facts: The Commissioner made an assessment of $900 against one Knott, who refused to pay. A distraint warrant was issued and a levy made by Allen, Collector, upon a buggy, horse, etc. The property was advertised and sold. Immediately after the sale, Sheridan, a constable, seized the property under a writ of replevin sued out by a third person as owner.

Questions: (1) Was the levy under the writ of replevin legal?

(2) What title did purchaser get?

Decision: (1) The replevin was legal for a sale of property by an internal revenue officer under a distraint warrant for the collection of a tax does not cut off the title of a third person who does not owe the tax and against whose property the warrant is not

directed, and the true owner may assert his title after the officer has transferred the property and completed his official acts with respect to the property.

(2) A sale of property by a collector under a distraint warrant is clearly distinguishable from a sale of property seized and condemned in forfeiture proceeding for violation of the customs or revenue laws, and passes only the interest of the tax debtor.

''Naturally, the purchaser gets no more than the collector is authorized to seize and sell, and we know of no rule, statutory or judicial, that in such cases bars a third person who was not a party to or concluded by the proceedings, and who claims to own the property, from asserting his claim against the purchaser in any forum having cognizance of ordinary controversies between individuals.''

SHOTWELL v. MOORE

(U. S. Supreme Court, March 5, 1889)
(129 U. S. 590)

Record: Tax law of Ohio. Section 3701, R. S. Suit against Shotwell for state taxes by Moore, Treasurer, in a state court of Ohio. Judgment for defendant. Appeal to state circuit court. Reversed and judgment entered for the amount of the tax. The decision of the latter court was affirmed by the Ohio Supreme Court. Writ of error. Affirmed by the U. S. Supreme Court.

Facts: Shotwell had on deposit in the bank to his credit as a general depositor certain sums of money, but in each year from 1881 to 1885, inclusive, he withdrew this money shortly before the second Monday of April. He checked out the amount and was paid, at his request, in United States securities called ''greenbacks,'' which he placed in a package and left with the bank for safekeeping. Soon after the date mentioned, he would demand this package and deposit the money with the bank again. The Ohio statute required that taxpayers list for taxation their property on the second Monday of April in each year. This money was not listed for the alleged reason that the United States securities in question were exempt from state taxation.

Question: Did the taxpayer escape the state taxation by this method?

Decision: The court held that Shotwell's actions constituted an attempt to avoid the payment of the tax and that the assessment was properly made. "And this court in Mitchell v. Leavenworth County, 91 U. S. 206, denounces conduct precisely similar to that of the plaintiff in error in this case, in the following language:

" 'United States notes are exempt from taxation by or under state or municipal authority; but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law.' "

SHUKERT et al. v. ALLEN, COLLECTOR
(U. S. District Court, D. Nebraska, Omaha D., 1924)
(300 Fed. 754)

Record: Federal estate tax. Trial at law involving a trust claimed by the government to be a disposition of property to take effect in possession and enjoyment after the death of the person creating the trust. A motion was made to instruct the jury that the trust in question was intended to take effect in possession or enjoyment at or after the death of the grantor and for verdict for the government, and another motion was made that the jury be instructed to return a verdict for the executrices of the estate.

Facts: Plaintiffs were executrices of the estate of Gustav E. Shukert. Before his death, Shukert created a trust, entirely parting with title to the property. Certain beneficiaries were to receive property after the expiration of 30 years. When he created the trust, he said he expected to be able to look after these beneficiaries for 15 or 20 years, but he was looking beyond that time; that he had in mind the possibility of their losing even the large fortune that he had and would probably give them, and that they would come into possession of this property after his death.

Question: Was this transfer taxable, as intended to take effect in possession or enjoyment at or after his death?

Decision: "Now, this trust was one in which the possession and enjoyment of it was to come to these beneficiaries long in the future,

and, according to the undisputed evidence here, and the clear evidence, beyond any time that he expected to live himself. There is offered in evidence a table of expectancy that would show his average expectancy, if he was a well man at the time, to be some fifteen or sixteen years, seventeen at the outside. He said himself to Mr. Cutler that he might expect to live for fifteen or twenty years, according to the testimony of the plaintiff, but the time when these beneficiaries were to come into the enjoyment and possession of this particular trust was beyond that time, and beyond the time of his death. Now, I understand clearly, I think, the argument that is made here that this trust should be treated and considered as a gift in praesenti, the deferred feature of it merely concerning the equitable title, but that the legal title passes in praesenti. It is conceded that Shukert had a right to make an absolute gift at that time of his property and it would not have been taxable under the statute, but that is not what he did." The trust "created by Mr. Shukert which he intended to take effect in possession and enjoyment long after he should have passed away; after it might be that the large fortune which he had accumulated had been lost through misfortune or extravagance or waste, or things that might happen after that. His care went clear to the time when thirty years should have gone by. His care for his children reached clear to that point and he intended that at that time it should take effect."

The instruction was given that the trust in question was intended to take effect in possession and enjoyment at or after the death of the person creating it and that the verdict should be for the government.

SIGMAN v. REINECKE, COLLECTOR

(U. S. Circuit Court of Appeals, Seventh Circuit, March 1, 1924)
(297 Fed. 1005)

Record: Revenue Act of 1921, section 250 (d) and section 3224, R. S. Appeal from decision dismissing bill for injunction against collection of taxes. Affirmed. (Certiorari denied, 264 U. S. 597.)

Facts: Prior to April 1, 1918, a return for taxes of 1917 was filed and the tax as returned was paid. Afterwards further assessments were made, and the amount was paid. In February, 1923, notice was given of a further tax liability. Taxpayer was notified he might appeal but would be required to execute a waiver of the statutory limitation. After April 1, 1923, the collector demanded payment, threatening distraint. The bill alleged irreparable injury if this were carried out and prayed an injunction on the ground that the Collector had no right or power to collect the tax after the lapse of five years from the making of the original return under the limitation in section 250 (d).

Question: Does section 3224, R. S., prevent the enjoining of the collection of an income tax by distraint, where demand for payment was not made until after five years, in view of the limitation in section 250 (d) of the Revenue Act of 1921?

Decision: The court referred to the argument that the words "suit or proceeding" referred to other than judicial action, but did not discuss this point further than to give the Government's argument.

Graham v. DuPont (ante) is conclusive that section 3224, R. S., applies, forbidding a suit to restrain the assessment or collection of a tax, and whatever remedy the taxpayer may have "is not through injunction, but only through the statutory provisions authorizing recovery back of a tax which ought not to have been assessed against him." For similar holdings, the court refers to Bashara v. Hopkins (ante); Crawford v. Couzens (ante); Executors v. Sturgess (ante); Witherbee v. Durey, Collector (post); and Hernandez v. McGhee (ante). The five-year limitation of section 250 (d) is subject to important provisos in the case of false or fraudulent returns, etc., or failure to file a return, in such cases there being no limitations, "thus imposing on the taxing authorities the duty to investigate and pass upon facts bearing in any case upon the application of the limitation." A court of chancery may not enjoin the collection of the tax and then make such investigation.

SILVERTHORNE LUMBER CO. v. UNITED STATES

(U. S. Supreme Court, January 26, 1920)
(251 U. S. 385)

Record: Fourth Amendment to United States Constitution. Indictment. Subpoenas, followed by order of court, to produce certain documents. On refusal to comply, defendants were adjudged in contempt of court. On writ of error the Supreme Court reversed the judgment.

Facts: Frederick W. Silverthorne and another were indicted on a single specific charge. While they were under arrest, representatives from the Department of Justice and the United States Marshal, without any authority but under color of an invalid subpoena based on the above indictment, raided the office of their company and seized all the books, papers and documents. Before these were returned by the district attorney (following application by the defendants for an order of court therefor), he presented the evidence thus obtained before the grand jury, made photographs and copies of the material papers, and secured a new indictment framed from the knowledge so gained. The court ordered the originals returned but impounded the photographs and copies. Then subpoenas and an order of court to produce the originals were served, and on defendants' refusal to comply, they were adjudged in contempt of court.

Question: May the knowledge gained by the Government from documents obtained by illegal search and seizure be used to force the owners in a more regular way to produce them?

Decision: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed * * *. It was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the

rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."

SIMONS v. UNITED STATES

(U. S. Court of Claims, 1884)

(19 Ct. Cls. 601)

Record: Claim transferred from the Treasury Department for the refunding of interest paid on a direct tax on property in Charleston, S. C. Judgment for plaintiff.

Facts: In 1862, the United States Direct Tax Commissioners for South Carolina valued the real property in the state for taxation. The Federal forces did not occupy Charleston until February 17, 1865, and the Commissioners "again fixed the amount of the tax" on property in that state. Such tax was collected from the claimant on his property in the State with a penalty of 10% interest from July 1, 1862, the date of the President's proclamation. It was paid by the claimant without protest, but such payment was required before he could obtain possession of the property and on its payment he was issued a receipt authorizing him to collect the rents on the property. In 1882, this claim was made and not until then did claimant intimate that any part of the payment was involuntary or illegal.

Questions: (1) Was this payment voluntarily made so as to prevent recovery?

(2) Was the claim barred by the statute of limitations?

Decision: (1) It was conceded that the payment of an illegal tax on personal property would not be deemed voluntary though made without protest but the contention was made that as to real property, where the owner could always bring his action of ejectment, the rule was different. The court said: "Where a man is obliged to pay an illegal tax to obtain possession of his property, whether it be personal or whether it be real, the payment is involuntary."

(2) The court said that both by the statute and by international law dealings were prohibited between individuals on different sides of military lines of opposing forces at war. After refer-

ring to certain United States statutes, the court said: "The claim, therefore, is one for which the law provides a permanent appropriation, and concerning which the Revised Statutes in effect declare the policy of the government to be that moneys collected by its agents under the direct tax laws which are not really taxes, that is to say, which were 'collected without warrant of law,' shall always be refunded, and the refunding shall not be dependent upon annual appropriation acts. Thus far the policy of the government is clear, and the intent of Congress unquestionable."

When Congress appropriates "money for the payment of a designated claim or class of claims already barred by the statute of limitations it must be inferred that the legislative intent was to give a new promise founded upon the old consideration." The joint resolution passed by Congress named no time when such claims should accrue, but provided for "the happening of an event, viz., their presentation to the Secretary of the Treasury, and upon the happening of that event each claim accrued. * * * The person entitled to the money could allow it to remain in the treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years he was not required to sue for it within that time."

SIOUX CITY & P. R. CO. v. UNITED STATES

(U. S. Supreme Court, January 21, 1884)

(110 U. S. 205)

Record: Suit by the Government for arrears of taxes. Judgment for plaintiff. Writ of error. Affirmed.

Facts: The government issued to the company so-called subsidy bonds in pursuance of an act authorizing such a course to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific. The 122nd section of the Revenue Act as amended in 1886 imposed a 5 per cent tax, "not only on all payments of interest due on bonds and on all dividends declared by any railroad or canal company, but also on 'all profits of such company carried to the account of any fund, or used for construction.' "

The court decided that the interest accrued on said bonds was not subject to be deducted from the gross receipts in order to ascertain the net earnings of the company. The company sued out a writ of error.

Question: Was the interest accrued on the subsidy bonds deductible in ascertaining the net income of the company subject to the tax?

Decision: "We think that the judgment was right. The accruing interest on the subsidy bonds loaned by the government to the company is payable by the company at a future day, to-wit, at the maturity of the bonds; and if a sufficient amount of the company's annual net earnings is laid aside (as it should be) to meet that interest when it shall become due, the amount so laid aside would be directly within the scope of the internal revenue act, as it stood when the net earnings in question arose."

The profits referred to in the statute are "the profits arising from the operation of the road or canal without deduction of interest paid to its bondholders, or dividends paid to its stockholders, * * *. Though in form government bonds, the subsidy act makes them a mortgage lien on the property of the company, and ultimately payable by the company, principal and interest, * * * and if an obligation had been imposed by the statute to pay both principal and interest as they respectively fell due, it would have made them substantially and in effect, the bonds of the company, and fairly taxable under the internal revenue act."

SMEDBERG v. BENTLEY, COLLECTOR

(U. S. Circuit Court, D. New Jersey, November, 1874)
(Fed. Cas. 12964)

Record: Act of Congress of July 14, 1870; U. S. Constitution, article 1, sections 9 and 2. Suit to recover income tax paid for the year 1871. Demurrer. Demurrer sustained.

Facts: Plaintiff's declaration alleged that the tax in question was a "capitation or other direct tax" under section 9, article 1, of the U. S. Constitution, and that as it was laid uniformly throughout the United States instead of being apportioned among the several

states under section 2, article 1, the act was unconstitutional and void and the tax illegally assessed and collected. Defendant interposed a demurrer.

Question: Was the act unconstitutional as imposing a direct tax?

Decision: "The question of the meaning of a direct tax, in the sense of the constitution, came under the consideration of the supreme court, in Hylton v. U. S., 3 Dall. 171 [ante]." * * * It was the unanimous opinion of the court that a tax on carriages was not a direct tax, but was included within the power to levy duties; and that the only direct taxes contemplated by the constitution were two, to-wit, a capitation or poll tax, and a tax on land."

The court then referred to Pacific Insurance Co. v. Soule, 74 U. S. 433 (ante 391) and Veazie Bank v. Fenno, 8 Wall. 533 (post).

"It is sufficient to say that the supreme court has left nothing to be done here, except to sustain the demurrer of the defendant."

SMITH v. KANSAS CITY TITLE AND TRUST CO. et al.

(U. S. Supreme Court, February 28, 1921)
(255 U. S. 180)

Record: Federal Farm Loan Act of July 17, 1916, as amended by the Act of January 18, 1918. Suit in the U. S. District Court by a stockholder to enjoin his corporation from investing in Federal Farm Loan bonds. Bill dismissed. Appeal. Affirmed.

Facts: The relief was sought on the ground that the acts in question were unconstitutional. It was argued that Congress had no power to grant tax exemption.

Question: Did Congress have power to exempt from taxation Federal Farm Loan bonds?

Decision: The court quoted section 26 of the Act, and said: "Deciding, as we do, that these institutions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows. * * * That the Federal government can, if it sees fit to do so, exempt such securities from taxation, seems obvious

upon the clearest principles. But it is said to be an invasion of state authority to extend the tax exemption so as to restrain the power of the State. Of a similar contention made in McCulloch v. Maryland, Chief Justice Marshall uttered his often quoted statement: 'That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control—are propositions not to be denied.' * * * The exercise of such taxing power by the states might be so used as to hamper and destroy the exercise of authority conferred by Congress, and this justifies the exemption. If the states can tax these bonds, they may destroy the means provided for obtaining the necessary funds for the future operation of the banks.''

The court held these banks constitutionally organized and the securities to be exempt from taxation.

SMYTHE, COLLECTOR, v. FISKE et al.

(U. S. Supreme Court, November 16, 1874)

(23 Wall. 374)

Record: Tariff Acts of July 30, 1864; July 14, 1862; May 2, 1861; July 30, 1846, and August 30, 1842. Suit by Fiske against Smythe, collector, to recover money imposed as duties upon imports. Judgment for plaintiffs. On writ of error the judgment was reversed and the cause remanded.

Facts: Fiske had imported silk neckties in October, 1868. The collector had exacted a duty of 60% by construing together the provisions of two Acts. One of these Acts, Act of August 30, 1842, in its 20th section, provided that any article not enumerated in the Act which bore a similtude in material, quality, or texture, or to the uses to which it might be applied, to any article mentioned therein, was chargeable with duty at the same rate which was chargeable on the article which it most resembled in the particulars mentioned. The other Act was the Act of July 30, 1864, which, in its 8th section, imposed a tax of 60% upon certain enumerated

articles, which included "scarfs," but not neckties. The collector contended that the neckties which plaintiff had imported were closest in resemblance to "scarfs," and although not enumerated, were chargeable with the duty of 60% imposed on "scarfs."

Fiske paid the tax levied under protest, admitting liability of only 35%.

Question: Does the last clause of Section 8 of the Act of 1864 in these words "on all manufactures of silk or of which silk is the component material of chief value, not otherwise provided for, 50 per centum ad valorem" refer to that Act or to previous Acts?

Decision: Adverting to and testing the Act by the principles that the revenue laws are to be construed liberally to carry out their purposes; that where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction; and that pre-existing law, and the reason and purpose of the new enactment are considerations of great weight; the court held that the clause referred solely to the provisions of the Act of 1864. "The construction we have indicated, of these statutes, is that given to them in their practical administration by the Treasury Department ever since their enactment. This, though not controlling, is not without weight and is entitled to respectful consideration."

SNYDER v. MARKS, COLLECTOR

U. S. Supreme Court, November 12, 1883)

(109 U. S. 189)

Record: Acts of July 13, 1866, and March 2, 1867, and section 3224, R. S. Suit in equity brought in a State court of Louisiana against a collector of internal revenue to obtain an injunction restraining him from seizing and selling the property of the plaintiff to satisfy taxes. An injunction having been granted ex parte, the collector removed the suit into the Circuit Court of the United States for the District of Louisiana. On order of the latter court to reform his pleading, plaintiff filed a bill in equity. A demurrer interposed was sustained and the suit was dismissed. Appeal to the Supreme Court. Affirmed.

Facts: Snyder was a tobacco manufacturer. In his bill he alleged that the assessments were void and illegal, one ground

being that they did not show upon what they were based, nor upon what the taxes were claimed to be due. This allegation had reference to one column in the assessment list headed: "Article or Occupation" which had the following item: "S. T. Tob. 7800½ lbs." He alleged further that he was without adequate remedy against the United States for the seizure of his property to pay the claims of the Government. A demurrer was interposed on the ground of want of equity, because no suit could be maintained in any court to restrain the collection of any tax of the United States, and because plaintiff could not be permitted in this suit to attack the validity or regularity of the assessments or restrain the execution of a warrant thereunder.

Questions: (1) Did the assessment list sufficiently show the subject-matter of the tax?

(2) Did the word "tax" in section 3224 of the Revised Statutes mean only a legal tax so that an illegal tax did not fall within the prohibition of the statute, and the collection of it might be restrained?

Decision: (1) Assessment lists may be interpreted by the instructions of the Internal Revenue Department that are complied with in preparing them. Resorting to these instructions, the court found that the abbreviations "S. T. Tob." meant that an assessment of a stamp tax on tobacco was imposed for having removed "taxable articles from his manufactory without the use of the proper stamp or for not having duly paid such tax by stamp at the time and in the manner provided by law." The list therefore showed a tax that the plaintiff might be liable to pay and one which the Commissioner had jurisdiction to assess against him.

(2) Section 19, Act of July 13, 1866, stated that "no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected" until the prescribed statutory proceedings before the Commissioner of Internal Revenue had been exhausted. Section 3224, R. S., provided that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Section 3224 had formerly been an amendment to the other Act and so construing these two sections together the court decided that the word "tax"

in section 3224 meant, a tax that was in a condition to be collected as a tax. "The addition of 1867 was in *pari materia* with the previous part of the section and related to the same subject-matter. The 'tax' spoken of in the first part of the section was called a 'tax' *sub modo,* but was characterized as a tax alleged to have been erroneously or illegally assessed or collected."

"The inhibition of section 3224 applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive and no other remedy can be substituted for it."

SOUTHWESTERN RAILWAY CO. v. GEORGIA

(U. S. Supreme Court, October, 1875)
(92 U. S. 676)

Record: Writ of error to the Supreme Court of Georgia. Decision reversed and case remanded with directions to reverse order of Superior Court.

Facts: The company, chartered in 1845, with an exemption from taxation beyond one-half of one per cent of its annual net income, was united with the Muscogee Railroad Co., a corporation entitled by its charter to a similar exemption. The union was effected under an act of the legislature approved March 4, 1856, the effect of which was to extinguish the Muscogee Company by its merger in the Southwestern.

Question: Was there a contract as to taxation which was violated by the later requirement of the State for a further tax?

Decision: "What we said in Central Railroad & Banking Company v. Georgia (92 U. S. 665) [ante], is applicable in its largest extent to the present case * * * no new corporation was created * * *; but the powers of the Southwestern were enlarged, and all the rights, privileges and property of the Muscogee Railroad Company became the rights and property of the Southwestern." The exemption from taxation could not be withdrawn and was unaffected by the later tax laws.

SPRECKELS SUGAR REFINING CO. v. McCLAIN, COLLECTOR

(U. S. Supreme Court, February 23, 1904)
(192 U. S. 397)

Record: Act of June 13, 1898, and Judiciary Act of 1891. Two suits to recover of McClain, collector, certain sums collected as taxes. By agreement the two suits were consolidated and tried as one cause. Judgment to plaintiff for $1,056.82 (109 Fed. 76). On writ of error, the Circuit Court of Appeals sustained, in most part, the judgment (113 Fed. 244). On a further writ of error the Supreme Court reversed both judgments and remanded the cause.

Facts: The plaintiff was a sugar refining company. It made returns covering its gross receipts from June 14, 1898, to August 1, 1900. Taxes were assessed which were computed on gross annual receipts which included wharfage that plaintiff had collected at rates according to a general tariff from vessels using its three wharves in unloading sugar consigned to it. Also included was interest on its deposits in banks and dividends from its stock in other companies. Plaintiff contended that the inclusion of these items for computing the tax was unlawful. Plaintiff performed all the requirements necessary as precedent to its actions against the collector.

Questions: (1) May a case arising under the revenue laws which also involves the validity of such laws, be taken from the Circuit Court of Appeals to the Supreme Court on writ of error under sections 5 and 6 of the Act of March 3, 1891?

(2) Did section 27 of the Act of 1898 impose an unapportioned direct tax on the business of refining sugar in providing that every refiner of petroleum or sugar and every owner or controller of "any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax" of one-fourth per cent on their gross income in excess of said sum?

(3) Did the Act require a tax to be paid on wharfage received by the plaintiff from vessels unloading sugar consigned to it?

(4) Were interest from deposits in bank and dividends upon stock in other companies properly included as part of the gross annual receipts in the business of refining sugar in computing the tax?

Decision: (1) Construing the 5th and 6th sections of the Act of March 3, 1891, together, the court decided that although section 6 of the Act provided that judgments or decisions of Circuit Courts of Appeals shall be final in all cases arising (among other laws and grounds), under the revenue laws subject to the exception, among several others, of review by the Supreme Court by certiorari, yet, as the case involved the constitutionality of the Revenue Act of June 13, 1898, it came within the purview of section 5, which provided that appeals or writs of error may be taken to the Supreme Court in certain specified cases, among which is "any case that involves the construction or application of the Constitution of the United States," and "any case in which the constitutionality of any law of the United States * * * is drawn into question." "The meaning of the words 'arising * * * under the revenue laws' in the 6th section" says the court, "is satisfied if they are held as embracing a case strictly arising under the laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the 5th section of the Act."

(2) The Act clearly, according to the court, imposes an excise tax, because "the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It can not be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts."

(3) As the importation of raw sugar from abroad was an essential part of the plaintiff's general business of refining sugar, the court said as follows: "The wharves were part of the instrumentalities and conveniences employed by the plaintiff for the successful management and conduct of its business of refining sugar." Therefore, the amount received for wharfage was an item of the gross receipts received by the plaintiff from its business of

refining sugar and was properly included therein for the computation of the tax.

(4) The statute imposes a tax only on receipts in the business of refining sugar, not on receipts from independent sources. "But, clearly," in the words of the court, "neither interest paid to the plaintiff on its deposits in the bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar."

STANDARD CARPET CO., INC. v. BOWERS, COLLECTOR

(U. S. District Court, S. D. New York, November 1, 1922)
(284 Fed. 284)

Record: Petition for a summary order directing the defendant as collector to return chattels seized under the revenue laws. Petition dismissed on condition.

Facts: A warrant was issued to search the premises of the petitioner on the ground that liquors had been unlawfully stored therein in violation of the National Prohibition Act. Thereafter a complaint was filed with the Commissioner for violation of the Internal Revenue Laws. The collector then entered the premises and took possession of certain chattels used by the petitioner in its business of dealing in rugs and carpets. A summary order was asked directing the collector to return the goods. No libel had been filed against them.

Questions: (1) May such a summary order for the return of the goods be issued?

(2) Has a court the power to order the collector to proceed with the forfeiture or release the goods?

Decision: (1) The provisions of the Revised Statutes for seizure and forfeiture of goods for violation of the internal revenue laws are intended to be complete. The owner may not replevy goods seized, and there is no provision of statute requiring the collector to file a libel at once. "Whatever be the hardships of the resulting delay, the statute means the forfeiture to be determined by plenary suit, and no such summary application as this will lie."

(2) Under Revised Statutes, section 934, the court held that the collector is amenable to the court before the goods are arrested.

"While under guise of that power I may not dispense with the necessity of plenary suit, I have power to prevent unjust delay. I can insist either that the collector proceed with the forfeiture or release the goods. That I will do. Therefore, an order will pass directing the collector to release the goods unless within three days after order entered he has filed a libel of information and arrested the goods; if he shall have done so, petition dismissed."

STANDARD MANUFACTURING CO. v. HEINER, COLLECTOR

(U. S. District Court, W. D. Pennsylvania, June 5, 1924)
(300 Fed. 252)

Record: Schedule A-2, section 1101, Revenue Act of 1921. Suit for the recovery of $9,937.80 paid as documentary stamp taxes. Judgment for plaintiff.

Facts: The tax was levied on "each original issue, whether on organization or reorganization of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation."

Plaintiff was a New Jersey corporation. "On January 11, 1923, by vote of its stockholders, plaintiff adopted a resolution providing for the reduction of the par value of its stock, from $100 to $25 per share, and the certificate of incorporation was amended accordingly. The outstanding 200,000 shares of stock were called in, to be replaced with 800,000 shares of the new stock, each stockholder thus receiving four shares of the new stock for one share of the old. There was no other consideration for the exchange. On the demand of the defendant, plaintiff purchased documentary stamps on the new stock issued, amounting on May 8, 1923, to the aggregate sum of $9,837.80, to recover which this action is brought."

Question: Was this taxable as an original issue of stock?

Decision: "From the plain reading of the Act, it is clear that the stamp tax is imposed only on certificates of stock of 'original issue'; and the single question is, whether the issue of the new certificates under the circumstances, constitutes an original issue within the meaning of the Act of Congress. This question has been answered in the negative in several cases."

STANLEY v. LEARY et al.

(N. Y. Supreme Court, Special Term, Kings County, May 4, 1923)
(199 N. Y. S. 617)

Record: Revenue Acts of 1917 and 1918. Action by Stanley to recover balance of commission as sales manager for defendants. Judgment for plaintiff. (The N. Y. Supreme Court Appellate Division, Second Department, on December 21, 1923, 202 N. Y. S. 954, reversed this judgment "upon the law, and complaint [was] unanimously dismissed, without costs, upon authority of Ransome Concrete Machinery Co. v. Moody," 282 Fed. 29, ante.)

Facts: In 1913, defendants employed plaintiff as sales manager and agreed to pay him a given salary, and from January 1, 1914, as additional compensation, a commission of 5 per cent to be computed annually upon the net profits of the firm. In computing his commission for 1917, the defendants first deducted the excess profits tax due under the Revenue Act of 1917. The plaintiff now contends that deduction was wrong.

Question: Was the excess profits tax due under Act of 1917 properly deductible by the employer from the firm profits before computing the commission of the employe?

Decision: Plaintiff was not a partner in the business but only an employe, although receiving part of his compensation from a small percentage of his employers' profits. His commission was properly deductible by them as a business expense under section 214 of the Act of 1918. That fact and the further circumstance that the income tax provisions were enacted long after the agreement was made between these parties, indicate that the computations to determine his commission should have been based upon the profits before any deduction for taxes.

STIRNEMAN v. SMITH et al.

(U. S. Circuit Court of Appeals, Eighth Cir., February 23, 1900)
(100 Fed. 600)

Record: Revenue Act of June 13, 1898. In an action, introduction of depositions was objected to because they were not stamped. The United States Circuit Court for the District of

Minnesota rendered judgment for plaintiff. Writ of error. Affirmed.

Facts: Depositions were taken before a notary. Schedule A of Revenue Act, June 13, 1898, provides that a 10-cent stamp be affixed on a "certificate of any description required by law and not otherwise specified in this Act." Notarial certificates involved in the present case are not referred to in any other provision of the Act.

Question: Do notarial certificates to depositions require a stamp before they become valid and admissible in evidence?

Decision: No stamp is required. Section 17 states that no stamp is required on bonds, certificates, etc., issued by public officers. "A notary public, when engaged in taking depositions to be used as evidence before some judicial tribunal, is a judicial officer. * * * While employed in such work, a notary cannot be regarded as the agent of the person or persons in whose behalf the testimony happens to be taken; but his duties are of an official nature * * * . Moreover, depositions which are taken before a notary * * * are neither private papers nor private property * * * . The certificate of a notary under his hand and seal, authenticating his official acts while serving in the capacity aforesaid, does not fall within the provisions of the recent internal revenue Act, * * * . Such a certificate is exempt from taxation * * * ."

STOUFFER v. CRAWFORD et al.

(Supreme Court of Missouri, March 5, 1923)
(248 S. W. 581)

Record: Income Tax Acts of Missouri. Suit to enjoin assessor, etc., from performing their duties under the Income Tax Law. Judgment for defendants sustained.

Facts: The Income Tax Act of 1919, amending laws of 1917, provides for taxing income for the whole year of 1919 though the Act did not go into effect until August 7, 1919. The collector seeks to assess for the whole year 1919. The Act also provides for an increase in rates and that the value on January 1, 1919, should be used as the basis to determine the gain or loss by corporations.

The earnings of certain insurance companies were exempted from taxation under this Act. The Act allows a resident certain deductions not allowed to nonresidents.

Questions: (1) Is the Act unconstitutional because it is retroactive?

(2) Is it unconstitutional because it is discriminatory?

(3) Is it unconstitutional because insurance companies are exempted?

Decision: (1) It is not retroactive insofar as it carried forward the provisions of the amended Act. As to the date for determining the value, although this date antedated the taking effect of the statute, it is not retroactive because such value was the basis of the previous existing statute and a mere increase in the rate of taxes during the last five months does not affect the validity of the annual basis of valuation.

(2) "So far as it concerns the discrimination asserted * * * , it is to be observed that appellant is in no way in a position to be affected by any of them. Under the long-established rule he is, for that reason, in no position to assail their constitutional validity."

"Corporations may be treated as a class for the purpose of * * * taxation. * * * The selection of one date for the date of valuation of property of individuals and another in the same year but six months previous does not of itself necessitate or disclose an inequality within the meaning of the Fourteenth Amendment. There is no conclusive presumption that properties of equal value would be valued differently at the different dates named."

(3) No, for "Insurance companies are separately taxed on their gross incomes in lieu of other taxes."

SWIFT & COURTENAY & BEECHER v. UNITED STATES

(U. S. Supreme Court, March 17, 1884)

(111 U. S. 22)

Record: Acts of July 1, 1862, March 3, 1863, June 30, 1864 and July 14, 1870. Suit in the Court of Claims involving certain commissions. Judgment for the United States. Appeal. Reversed.

Facts: The statutes allowed a commission of 10 per cent to dealers in proprietary articles or stamps made from their own dies. The purchasers gave bond and remitted from time to time. For instance, at one time a remittance of $2,500 was made, whereupon the internal revenue office credited the remitter with the $2,500 and with a $250 commission, all of which was applied against purchases of stamps. Plaintiffs contended that the commission should be paid in money and not simply in stamps at their par value. Defendant claimed that plaintiff was estopped to deny the right of the Government to pay the commission in stamps by reason of a long course of dealing in which that had been the regular practice, and also that plaintiffs could recover nothing beyond the six-year statute of limitations.

Questions: (1) Were the plaintiffs entitled to be paid in cash and were they estopped from asserting that right by the course of dealing?

(2) Might recovery be had beyond the six-year limitation?

Decision: (1) "The question is whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid, or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria.* * * *

"A rule of that character, deliberately adopted and made known, and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced."

(2) "We are also of opinion that he is not entitled to recover for so much of it as accrued more than six years before the bringing of his suit. There was nothing in the nature of the business, nor in the mode in which it was conducted, nor in the accounts it

required, that prevented a suit from being brought, for the amount of commissions withheld, in each instance as it occurred and was ascertained."

The judgment was reversed and the cause remanded with directions.

TEVANDER v. RUYSDAEL
RUYSDAEL v. TEVANDER

(U. S. Circuit Court of Appeals, 7th Cir., April 18, 1924)
(299 Fed. 746)

Record: Suit in equity by Eleanor M. Ruysdael against Olof N. Tevander. From a decree on accounting both parties appeal. Modified and affirmed.

Facts: In the original bill the plaintiff secured a decree holding the incorporation of the Standard Cap & Seal Company, for naught, adjudging the true relation between Tevander and herself to be that of copartners, decreeing that the partnership be dissolved, ordering an accounting with Tevander, adjudging that certain patents standing in the name of Tevander be assigned to the partnership, and ordering a sale and distribution of the assets between the partners (253 Fed. 918). The possession of and legal title to the assets were then in the corporation. Plaintiff sought, not that the corporation be dissolved, but that the transfer to the corporation be declared void, because of the fraud, and the assets delivered up to a receiver, to be appointed by the court, for distribution.

The real purpose of the bill was to bring recognition of a trust estate and to have such estate administered by the court. Plaintiff now seeks to have taxed against the defendant her solicitors' fees and expenses in this litigation. During the year 1918, subsequent to the decree entered after the previous appeal, the business was conducted by a receiver. The Treasury Department first ruled that the income taxes for the year should be computed upon a copartnership basis and should be assessed against the individuals as copartners. Two years later the department reversed this holding, and ruled that the income tax for the year 1918 should be assessed against the business as a corporation. The decree and

order of sale both provided that at the sale the purchaser should assume all existing debts against said business. There were no known debts, but the receiver retained $20,000 from the purchase price of $451,000 as indemnity against the purchaser's assumption. After the original holding by the Treasury Department, at the request of the purchaser, $13,000 was surrendered to it, and $7,000 retained, $2,000 of which was used to pay a capital stock tax imposed by the government, and $5,000 of which was ultimately paid by the receiver as part of the income tax finally assessed against the business as a corporation. The balance of the income tax for the year 1918, being $19,972.25, was thereafter paid by the receiver from the funds in his hands.

Plaintiff petitioned that the purchaser be required to reimburse the receiver for the last-named amount. The petition was denied. The order of sale was of the assets of the Standard Cap & Seal Co. "the co-partnership heretofore existing" and it also provided that it should include "all shares of capital stock of a certain alleged corporation" known as the Standard Cap & Seal Company.

Question: Was the purchaser required to pay the taxes in question?

Decision: "The word 'debt,' in its technical meaning as applied to common-law actions, is not synonymous with the word 'tax.' Lane County v. Oregon, 74 U. S. 71. But the word 'debt' is not always used with this limited technical meaning. A 'tax' may or may not be a debt under a particular statute, according to the sense in which the word is found to be used. U. S. v. Chamberlin, 219 U. S. 254 [ante 529]. The word 'debt' is frequently used in its well-recognized sense as that which is due from one person to another; that which one person is bound to pay another; a thing owing; an obligation; a liability. The character of a tax is well known. It is a charge or burden laid upon persons or property for public purposes; a forced contribution authoritatively imposed. When it is imposed annually—that is, when the law provides for its imposition—it is, before its due date, a liability in futuro, imposed by law, and when finally imposed it becomes a fixed liability, a thing owing, a matured obligation.

"It is apparent from the language used that the parties intended that the purchaser should assume all obligations or liabilities of the business. The parties knew that the law imposes income taxes. All parties knew that at the time of the sale the income taxes were liabilities in futuro; that they would become, when imposed, a fixed liability, a thing owing to the government. The purchaser, therefore, by assuming the debts of the business, included income taxes of the business."

"This court did not, in its former decision, dissolve the corporation or attempt to do so, but it found the status to be, as adjudged in the decree entered subsequently, that the corporation held the legal title to the assets in trust for the co-partnership. This title was transferred to the receiver, who thereupon succeeded to the legal title and held the same in trust for the co-partnership. The transfers to the corporation by the co-partnership were set aside as fraudulent, and, so far as the rights of the parties between themselves were concerned, the status quo ante restored. The business was then being conducted, and had previously been conducted as a corporation. So far as the rights of third persons were concerned, so far as the government was concerned, the business was a corporation in its legal relationship with other people, and obviously because of this fact the Treasury Department ruled that the tax assessed should be that of a corporation. Any debt owing because of the operation of the business was, so far as third persons were concerned, a corporate obligation, for which the copartnership property became liable in equity. Had money been borrowed by the corporation at the bank for the purposes of the business, the obligation would have been a corporate obligation, which the co-partnership property was bound to pay. So the taxes owing to the government, being an obligation of the co-partnership business standing in the name of a corporation, was, as to third persons, a corporate tax, a corporate debt, though the co-partnership assets would become charged with the same. So, when the purchaser agreed, by bidding under the decree of the court, to assume all debts of the business, he must have intended to assume all obligations which, because of the peculiar circumstances, were as to all third persons corporate debts, but which in equity were charge-

able against the co-partnership. There is no inconsistency between this finding and the former decree. The purchaser must be charged with the balance of the income tax for the year 1918, amounting to $19,972.25.''

THACHER'S DISTILLED SPIRITS
THACHER v. UNITED STATES

(U. S. Supreme Court, April 21, 1881)
(103 U. S. 679)

Record: Section 3249, Revised Statutes. Action by U. S. District Attorney against goods claimed to be forfeited. Judgment for United States in the U. S. Circuit Court, Southern District of New York. Writ of error. Affirmed.

Facts: Section 3249, Revised Statutes, authorizes the Commissioner ''To prescribe rules and regulations to secure a uniform and correct inspection, weighing, marking * * * of spirits.'' Under this the Commissioner made a regulation that ''Whenever any rectifier proposes to empty any spirits for the purpose of rectifying, purifying, refining, * * * he will file with the collector a notice * * * giving the number of casks or packages, the serial number * * * by whom produced, * * * by whom inspected, and the date of inspection.'' A false statement was sent in to escape payment of full stamp tax.

Question: Did the Commissioner have authority to prescribe the above regulations?

Decision: Yes. ''The internal revenue law is very specific * * * and it was still found necessary to authorize the bureau, which had charge of the collection of that tax, to prescribe regulations for conducting the business of making and selling whisky, and to adopt forms of reports in the information which it must receive from the officers engaged in collecting the tax, and the parties who should pay the tax. The rule in question seems to be a reasonable one and within the purview of the power conferred.''

THATCHER et al. v. LOWE, COLLECTOR

(U. S. District Court, S. D. of New York, November 22, 1922)
(288 Fed. 994)

Record: Income Tax Act, October 3, 1913. Suit to recover taxes. Judgment for defendant.

Facts: A lawyer operated a farm as an adjunct to his country place at a heavy loss. In one year the expenses of the farm were over $16,000, while there was an income of only $1,100, and in another year with a similar expense there was an income of $1,600.

Question: Were the expenses of conducting the farm a proper deduction as a business expense?

Decision: The court distinguished Wilson v. Eisner, 282 Fed. 38 (post), and Plant v. Walsh, 280 Fed. 722 (ante 961), and held that the evidence indicated that the farm was not conducted as a business and that, therefore, the losses were not deductible. If "a man does not expect to make any gain or profit out of the management of the farm, it cannot be said to be a business for profit."

THOMAS v. UNITED STATES

(U. S. Supreme Court, February 23, 1904)
(192 U. S. 363)

Record: Stamp tax, Act of June 13, 1898; U. S. Constitution, article 1, section 2, clauses 3 and 8. Indictment. Conviction. Writ of error. Affirmed.

Facts: Thomas was indicted for a violation of the revenue laws, in that, being a broker, he sold certain shares of stock and omitted the required revenue stamps from the memorandum of sale. He demurred to the indictment on the ground that the Act was unconstitutional. The demurrer was overruled. After trial he was fined $500. He sued out a writ of error.

Question: Was the Act of June 13, 1898, unconstitutional in its requirement of revenue stamps?

Decision: The court said there were two kinds of taxes, (1) direct taxes and (2) duties, imposts and excises. "The present case involves a stamp tax on a memorandum or contract of sale of a certificate of stock, which plaintiff in error claims was unlawfully exacted because not falling within the class of duties, imposts and excises, and being, on the contrary, a direct tax on property."

"The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates.

The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation.''

THOMPSON v. UNION & MERCANTILE TRUST CO.

(Arkansas Supreme Court, May 19, 1924,
Rehearing Denied June 16, 1924)
(262 S. W. 324)

Record: Estate tax, Revenue Act of 1918. Suit to recover from administrator a part of the estate tax which it had deducted from the widow's dower. Judgment for defendant. Appeal. Reversed and remanded.

Facts: Action against the company as adminstrator. The company had deducted from the widow's dower a proportionate share of the estate tax. She sued for the balance.

Question: May a proportionate part of the estate tax be deducted from the widow's dower?

Decision: The court said that the Federal statute included in the gross estate ''any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy.''

The statute ''takes no account of distributive shares in the estate under state laws, and the statute does not attempt to apportion the tax, as the question of apportionment and distribution of a decedent's estate is dependent entirely upon state law.''

''The dower right and the tax lien are coexistent, but the dower right is subordinate to the tax lien, for the reason that the tax is imposed on the whole estate. The tax is not taken into account in determining the amount of the estate out of which the dower is carved, but, as before stated, the statute in express terms provides for endowment out of the whole of the personal estate of which the husband died seized or possessed. * * * It follows from what we have said that the administrator had no right, after paying the tax out of the funds of the estate, to deduct any part from the widow's dower.''

TRAYLOR ENGINEERING & MFG. CO. v. LEDERER, COLLECTOR

(U. S. Circuit Court of Appeals, Third Cir., March 14, 1921)
(271 Fed. 399)

Record: Act of September 8, 1916. Action to recover a tax paid. Judgment for defendant (266 Fed. 583, supra, 507). Writ of error. Affirmed. (Certiorari denied, 257 U. S. 638).

Facts: The plaintiff and two individuals, Trexler and Phillips, financed a trip of its president to England to negotiate a munitions contract with the British Government, it being agreed that the profits from such a contract should be divided among the three in the proportion that the contributions bore to the total expense of the trip. The contract was secured for the plaintiff by its president. Trexler and Phillips became indemnitors with plaintiff on an indemnity bond required by the British Government. Trexler and Phillips contributed no capital toward the contract and did nothing to perform it except in one instance when Trexler obtained permission to test the shells on a private proving ground.

The plaintiff completed the munitions contract prior to February 1, 1916, when it paid Trexler and Phillips their share of the profits in compliance with the "grubstake" agreement. On September 8, 1916, the Munition Manufacturers' Tax Law was passed. It imposed a tax of 12½ per cent to be paid by the person manufacturing munitions, on the net profits "received or accrued for said year [1916] from the sale or disposition of such articles."

The plaintiff made a return of its profits realized in 1916 from its contract and deducted the share of the profits going to Trexler and Phillips as being "running expenses" allowed as deductions by the Act, contending that it was compensation for services performed in procuring the munition contract by contributing to the expenses of the trip and in becoming indemnitors on the bond. The Commissioner disallowed the deduction and assessed an additional tax. This was paid under protest and was the subject of this action.

Question: Were the plaintiff, Trexler and Phillips, associated in the manufacture of the shells or was the plaintiff alone the manufacturer?

Decision: The plaintiff, Trexler and Phillips were not associated together in the manufacture of munitions for the British Government. Their only association together was in financing the negotiations for a contract for the chance of dividing profits from the contract if procured, if performed, and if profitable. The plaintiff alone procured and performed the munitions contract. Trexler and Phillips were interested only in the profits from this contract, not in the contract itself. Hence, the plaintiff "was alone the 'person,' within the terms of the statute, that was engaged in manufacturing these munitions * * *."

"While the tax is leveled against the 'person manufacturing' munitions, it is assessed against net profits arising 'from the sale and disposition' of munitions manufactured * * *." The profits here involved arose solely from plaintiff's performance of its contract with the British Government. There were two contracts in the case; under the one, the munitions were to be manufactured, and under the other, the profits were to be distributed. If the plaintiff "chose before creating profits to promise by a side-contract to give or pay them to others when earned, then he could do so only after the Government had exacted the tax for the privilege of doing the particular business out of which he had made profits of this kind."

TRINIDAD, COLLECTOR v SAGRADA ORDEN DE PREDICADORES

(U. S. Supreme Court, January 14, 1924)
(263 U. S. 578)

Record: Revenue Act of 1913. Action to recover tax. Judgment for plaintiff. Affirmed.

Facts: Plaintiff was a corporation solely organized and operated for religious, benevolent, scientific and educational purposes in the Philippines and at its missions in China, Cochinchina and Japan. None of its income was applied to the benefit of any particular stockholder or indivdual or any of its members. It had large properties in the Philippines consisting of "real estate, stocks in private corporations, and money loaned at interest, all of which are held and used as sources from which to obtain funds

or revenue for carrying on its religious, charitable, and educational work; the bulk of its income consists of rents, dividends, and interest derived from these properties; the rest of its income is relatively small and comes from alms for mass, profits from occasional sales of some of its stocks, and sums received, in excess of cost, for wine, chocolate, and other articles purchased and supplied for use in its churches, missions, parsonages, schools, and other subordinate agencies." The income from these sales amounted to less than 3% of its total income. The defendant contended the plaintiff was not operated exclusively for religious, etc. purposes.

Question: Was the corporation exempt as one "organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual?"

Decision: Two matters apparent on the face of the clause (the exemption clause quoted) go far toward settling its meaning. "First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific, or educational purposes, and yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption.

"Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities can not be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit. This is particularly true of many charitable, scientific, and educational corporations and is measurably true of some religious corporations. Making such properties productive to the end that the income may be thus used does not alter or enlarge the purposes for which the corporation is created and conducted. This is recognized in University v. People (99 U. S. 309, 324), where this court said: 'The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes, in the fullest and clearest sense.' To

the same effect is Methodist Episcopal Church, South v. Hinton (92 Tenn. 188, 200). And in our opinion the excepting clause, taken according to its letter and spirit, proceeds on this view of the subject.''

''As respects the transactions in wine, chocolate, and other articles, we think they do not amount to engaging in trade in any proper sense of the term. It is not claimed that there is any selling to the public or in competition with others. The articles are merely bought and supplied for use within the plaintiff's own organization and agencies—some of them for strictly religious use and the others for uses which are purely incidental to the work which the plaintiff is carrying on. That the transactions yield some profit is in the circumstances a negligible factor. Financial gain is not the end to which they are directed.

''Our conclusion is that the plaintiff is organized and operated exclusively for religious, charitable and educational purposes within the meaning of the excepting clause. Judgment affirmed.''

TRUMBULL STEEL CO. v. ROUTZAHN, COLLECTOR

(U. S. District Court, N. D. Ohio, September 22, 1923)
(292 Fed. 1009)

Record: Revenue Act of 1921. Suit to recover stamp taxes paid under protest. Defendant's demurrer overruled.

Facts: The plaintiff amended its articles of incorporation, changing the par values of each share of stock from \$100 to \$25. The outstanding certificates were called in and four new shares for each of the old were issued. No other change in corporate organization was made.

Question: Were the new certificates subject to a stamp tax of 5 cents on each \$100 par value?

Decision: Court found that sections 1100 and 1107 of the Revenue Act of 1921 were precisely the same as the corresponding sections of the War Revenue Act of 1918, and in all provisions pertinent to this controversy, these two revenue acts are the same as the War Revenue Act of 1917 and also substantially the same as the corresponding provisions in the Spanish War Revenue Act of 1898 and the emergency War Revenue Act of 1914.

The court held that the case of Edwards v. Wabash Railway Co., 264 Fed. 610 (ante 193), decided under the War Revenue Act of 1917, correctly stated the law in pointing out that the departmental construction excluding from the stamp tax on stock certificate reissues where there was no change of ownership but merely substitution in the hands of the same stockholder of certificates for one class of stock in lieu of certificates for another class, promulgated in connection with the Spanish War Revenue Act and also with reference to the Revenue Act of 1914, was adopted by Congress, since the same language was reenacted in the Revenue Act of 1917 after the departmental construction had been established. The new certificates were held to be not subject to the stamp tax.

TRUSLER v. CROOKS, COLLECTOR

(U. S. District Court, W. D. Missouri, W. D., July 30, 1924)
(Not yet reported)

Record: Section 3, Act of August 24, 1921, the Future Trading Act; U. S. Constitution, article 1, section 8, and the 10th amendment. Suit to recover tax paid. Judgment for defendant. (Pending in Supreme Court.)

Facts: The tax was exacted upon a written contract granting the privilege or option for a contract for the sale of grain under the form commonly known as an "indemnity," and was paid by affixing internal revenue stamps. Plaintiff contended section 3 of the Act was unconstitutional.

Question: Is said section 3 unconstitutional?

Decision: The court quoted section 3 aforesaid and said that section 4 had been held unconstitutional in Hill v. Wallace, 259 U. S. 44 (ante 905). Section 11 provides that if any provision of the Act is held invalid, the other parts of the Act should not be affected thereby.

"It is urged by able counsel for the plaintiff that the tax in the instant case is a penalty and not a tax. This contention can not be sustained, as the penalties referred to by counsel attach to that legislation where the Congress has mistakenly endeavored to regulate business clearly within state control and to enforce such regulations by the imposition of a tax. Such was the situation

in the Child Labor Tax case, 259 U. S. 20 [ante 841], also Hill v. Wallace, supra. In the latter case, section 4 of the Act under observation sought to impose a tax but such tax was so interwoven with regulations as to give it the aspect of a penalty for failure to observe such regulations rather than a tax.

"In the instant case, section 3, provides for the imposition of a tax without regard to regulations and such tax meets the requirement of uniformity. It is in compliance with and not violative of the Constitution and its enactment is the exercise of a power clearly conferred upon the Congress by the Constitution."

TURPIN & BROTHER v. BURGESS, COLLECTOR

(U. S. Supreme Court, April 5, 1886)
(117 U. S. 504)

Record: Act of July 20, 1868. Suit to recover amounts paid collector from 1869 to 1872, inclusive, for stamps affixed to packages of tobacco intended for export. Judgment for defendant. Writ of error. Affirmed.

Facts: The Act in question imposed a tax on tobacco, but tobacco intended for export was relieved from this tax by affixing to each package, of whatever size, a 25 cent stamp engraved to indicate the intent to export the same. In 1872 the price of the stamp was reduced to 10 cents. Plaintiff claimed this was a tax on exports, forbidden by the Constitution.

Question: Was the Act unconstitutional?

Decision: The court said: "We had occasion to examine the very question raised in this case in Pace v. Burgess, reported in 92 U. S. 372, * * * [ante], and were unanimously of opinion that the Act requiring the exportation stamp complained of was a valid and constitutional Act."

Since that decision "Congress has abolished all charge for the exportation stamp, by an Act passed August 8, 1882, entitled 'An Act to Repeal So Much of Section 3385 of the Revised Statutes as Imposes an Export Tax on Tobacco.' It is argued that the language of this title is a concession by Congress that the charge for the stamp was an export tax."

The court said that the expression may have escaped the attention of the members of Congress, but that even if intentional, it was but the expression of an opinion by one Congress as against that of the Congress that passed the Act. Besides, an expression of opinion on the part of Congress, however much to be respected, is not binding on us.''

'In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer. Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question, they could not have complained. But it was not. A special indulgence was granted to them, in common with others, in reference to the particular tobacco which they declared it to be their intention to export. With regard to that, in order to identify it, and to protect the government from fraudulent practices, all that was required of the plaintiffs, was to affix a twenty-five cent stamp of a peculiar design to each package, no matter how much it might contain, and enter into bond either to export it according to the declared intention, or to pay the regular tax, if it should not be exported. In this view of the case, the plaintiffs not only had no ground of complaint, but they were really the objects of favorable treatment on the part of the government, which, on the slight and easy conditions referred to, accepted their declared intention to export the tobacco in question, before it was commenced to be exported, or put in the way of exportation.''

UNDERWOOD TYPEWRITER CO. v. CHAMBERLAIN

(U. S. Supreme Court, November 15, 1920)
(254 U. S. 113)

Record: Action by the company against Chamberlain, Treasurer of Connecticut, to recover taxes paid. Judgment for defendant in the Superior Court of Connecticut, after questions as to the validity of the tax had been answered affirmatively by the Supreme Court of Errors of Connecticut (94 Conn. 47). Writ of error. Affirmed.

Facts: The company, a Delaware corporation, contended that, as applied to it, the taxing act violated rights guaranteed by the Federal Constitution. Connecticut established in 1915 a comprehensive system of taxation applicable alike to all foreign and domestic corporations carrying on business within the state. This was about the only system of taxation of corporations, aside from the general property tax. Manufacturing and trading companies were included in the fourth class. Upon their net annual income a tax of two per cent was imposed. The company's main office was in New York City. All its manufacturing was done in Connecticut. It had branch offices in other states for the sale, lease and repair of machines and the sale of supplies. It had one such branch office in Connecticut. The articles made by it and certain articles purchased by it were stored in Connecticut until shipped direct to the branch offices, purchasers or lessees.

Its return made in 1916 showed that its profits during the preceding year amounted to over $1,336,000, and that the proportion of its real estate and tangible personal property in Connecticut was 47 per cent. Under the state law, the tax commissioner assessed a tax on that percentage of its profits, as having been earned from business done within the state, the tax amounting to over $12,000. The company paid this tax and began suit for its return.

Questions: (1) Was the taxing statute void as burdening interstate trade, under section 8 of article 1 of the Federal Constitution?

(2) Was the taxing statute void as violating the Fourteenth Amendment, because imposed on income arising from business conducted beyond the boundaries of the state?

Decision: (1) "Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. * * * The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed

upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising the franchise within the state. * * * This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled. * * * Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause.''

(2) In support of its objection that business outside the state is taxed, plaintiff showed that less than 4 per cent of its income was received in Connecticut, while under the taxing statute, 47 per cent of its income was considered attributable to operations in Connecticut. ''But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in the state. The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state. 'The plaintiff's argument on this branch of the case,' as stated by the Supreme Court of Errors, 'carries the burden of showing that 47 per cent of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which, 80 per cent of its gross earnings was derived after paying manufacturing costs.' The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary, or that its application to this corporation produced an unreasonable result.''

UNION FISHERMEN'S CO-OPERATIVE PACKING CO. v. HUNTLEY, COLLECTOR

(U. S. District Court, D. Oregon, January 2, 1923)
(285 Fed. 671)

Record: Sections 3224 and 3226, R. S. Suit to restrain the collection of taxes. Dismissed.

Facts: Plaintiff was assessed for the years 1916, 1917 and 1918 additional income tax of over $48,000. He filed claim for abatement and a written request for a hearing. More than six months having elapsed after filing the claim, suit for an injunction was begun.

Question: Should Section 3226 of the Revised Statutes, permitting suit for the recovery of taxes, be extended to include a suit for an injunction where claim in abatement has been filed, and after six months has elapsed?

Decision: "Obviously Section 3226 relates to a recovery from the Government of a tax that has already been paid to it. Otherwise there would be an irreconcilable repugnancy between it and Section 3224. * * * Under the statute thus construed, the plaintiff is without its remedy for restraining the collection of the tax complained of."

UNITED STATES EX REL. GREYLOCK MILLS v. BLAIR, COMMISSIONER

(Court of Appeals, D. C., December 3, 1923. Rehearing denied December 21, 1923)
(293 Fed. 846)

Record: Revenue Act of 1918, Section 212. Petition for mandamus to compel Commissioner to accept amended returns. Appeal from judgment sustaining demurrer of respondent. Affirmed. (Certiorari was denied by the Supreme Court.)

Facts: Prior to 1918, the Greylock Mills had submitted returns on a calendar year basis. After the passage of this act, on the advice of its accountants, it submitted returns on a fiscal year basis for the years 1918 to 1922, inclusive. Appellant alleged that it learned from a departmental ruling, that, in view of the way

it kept its accounts, it might use the calendar year basis. Its application to change to that basis was denied and the suit was brought.

Question: May a taxpayer who voluntarily rendered returns on a fiscal year basis for several years compel the Commissioner to accept amended returns for those years on a calendar year basis, and returns on that basis for the future?

Decision: "The purpose of the Income Tax Law was the raising of revenue to meet pressing needs of the government. The provisions of this law, at least so far as they relate to the question here in issue, were reasonably free from ambiguity. Whatever may have been the view of the accountants employed by appellant as to the proper interpretation of those provisions, it was the duty of appellant, within a reasonable time, to invoke the discretion of the Commissioner of Internal Revenue, if a change to a calendar year basis was desired. Instead of doing this, however, appellant thereafter filed several returns upon a fiscal year basis and paid its taxes accordingly. It will be apparent, at once, that if taxpayers were to be permitted, several years after voluntarily filing a return upon one basis, to compel the commissioner to accept returns for the same period upon a different basis, endless and needless confusion would result, and the real purpose of the law" would be measurably defeated.

UNITED STATES ex rel. UNION PACIFIC R. R. CO. v. BLAIR, COMMISSIONER

(District of Columbia Supreme Court, April 21, 1924)
(Not yet reported)

Record: Sections 252, 1303 and 1315, Revenue Act of 1921, and section 3220, R. S. Petition for writ of mandamus. Demurrer to answer. Demurrer sustained.

Facts: Relator recovered a judgment May 6, 1922, against the collector for the second district of New York, for an amount of an additional assessment of income tax for 1913. A certificate of probable cause was granted. On or about May 12, 1922, relator filed with the collector a "credit claim" in which it demanded

that the amount of said judgment be credited against the installment of income tax due June 15, 1922. The Government insisted that as the original claim of relator had been reduced to judgment, payment thereof could be had only pursuant to section 3220 R. S., as amended by section 1315 of the Revenue Act of 1921, and pursuant to article 1051 of regulations 62, based upon section 1303 of said Revenue Act.

Question: Was relator entitled to have the said judgment credited against the income tax due from him?

Decision: The court said that, in its opinion, "Section 1315 of the Act and Article 1051 of the regulations are designed to cover applications for the remission, refund or payment back of taxes erroneously or illegally assessed or collected, and to repay to a collector or other named officials such sums of money or damages recovered against him or them in any court. The relator has made no application of the character contemplated by the section and article, nor it seems was it necessary for it to do so. By the judgment that it recovered the erroneous or illegal character of the assessment paid under protest by it, was finally adjudicated and, when a little more than a month later it became obligated to pay an installment of income tax much larger than the amount of its judgment, it proceeded to do so by the wise and practical method of seeking that its much larger tax debt be credited with the amount of income tax previously paid by it under the protest, and which was, as admitted by the respondent herein, in excess of that then properly due. This, in the opinion of the court, was one of the situations intended by the Congress to be covered by the mandatory provisions of Section 252 of the Revenue Act of 1921, heretofore quoted. In seeking the credit the relator was not, in a technical sense at least, seeking either a remission, refund or payment back of the illegal tax exacted of it. Had it not been a taxpayer from whom there was due taxes, shortly required to be paid, but was a judgment creditor only, desiring to secure payment thereof, then it would have been compelled to proceed under Section 1315 and Article 1051 of the Treasury regulations, dealing with the subject.

"Section 252 of the Revenue Act of 1921 provides a simple, direct mode for adjusting equitably the kind of a claim which the relator makes in this case. The statute is plain and compelling in its terms. Compliance with it will do justice to the relator in a manner which avoids circumlocution and does no violence to administrative policy. It requires a mere ministerial act on the part of the respondent and affords to the relator a relief for which there is not other adequate remedy."

UNITED STATES v. ALABAMA GREAT SOUTHERN R. R. CO.

(U. S. Supreme Court, January 18, 1892)
(142 U. S. 615)

Record: Act of July 12, 1876. Petition filed in the Court of Claims to recover certain sums alleged to be due for the carriage of mail. Judgment of Court of Claims in favor of the plaintiff (25 Ct. Cls. 30) affirmed.

Facts: The Act of 1876 provided in Section 13 that those companies whose railroads were constructed in whole or in part by land grants made by Congress on condition that the mails should be transported over their road at a price to be fixed by Congress, should receive only 80 per cent of the compensation authorized by the Act. Only a part of plaintiff's road was aided by such land grants. The Postmaster General ordered the reduced rate for almost all of its road. His predecessors had so construed the act that the reduced compensation had been given for only the part of the road affected by land grants. The new order was made retroactive as well as prospective.

Question: Could the Postal Department reverse its ruling with reference to the interpretation of a statute so as to make it retroactive and collect back money paid the railroad?

Decision: "We think the contemporaneous construction thus given by the executive department of the Government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equity of the case—should be considered as decisive in this suit. It is a settled

doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government."

UNITED STATES v. BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING COMPANY et al.

(U. S. District Court, S. D. New York, June, 1924)
(Not yet reported)

Record: Revenue Act of 1909. Suit by the United States for a corporation tax. Complaint dismissed.

Facts: The Boston company was organized as a Montana corporation in July, 1887, for mining copper and other metals. March 31, 1910, it sold all its property and assets, subject to its liabilities, to the Anaconda Copper Mining Company for stock of the latter company. On that date the book value of its assets was over $12,000,000 and the actual value of its net assets was at least $60,000,000 and the value of the stock received therefor was at least $60,000,000, the sale thus representing a profit of over $47,000,000. It had filed returns of its income and paid the tax under the law of 1909. The profit of $47,969,729.77 represented merely the increase in the value of its properties, not shown on its books; and the suit was brought on the so-called 'straight-line' theory, that such increase should be treated as having accrued ratably over the period from July, 1887 (when the company was organized), to March 31, 1910 (the date of the sale), on which theory $2,635,699.44 of the profit accrued after December 31, 1908, and was subject to tax at 1 per cent, under the Revenue Act of 1909. The judgment demanded was for the amount of the tax,

with penalty and interest at 1 per cent a month. It was concededly liable for taxes on such part of the increase in question, if any, as in fact accrued during the fifteen months' period from January 1, 1909, to March 31, 1910. The suit was instituted and was tried by the plaintiff upon the theory that, upon the facts stated, the Treasury Department and the courts were bound to presume that a proportionate part of the profit accrued subsequent to January 1, 1909, upon which the defendants were liable for tax, unless they could show affirmatively that the price received did not exceed the fair market value of the properties on January 1, 1909, (plus earnings after that date, which had been duly accounted for).

Question: Will the courts presume, in the absence of evidence that an increase in value of assets, for a period both before and after the incidence of a tax, ratably accrued, so that a proportionate amount of such increase will be subject to the tax?

Decision: "It is to be noted that the suit is not one brought by a taxpayer to recover a tax levied under an application of the 'straight-line' rule, and paid under protest. In such case, the taxpayer being the plaintiff assumes the burden of showing the exaction unwarranted, and hence of showing that the actual income was less than that assessed by the Government. Here the Government made no assessment, but comes into court asserting that defendants had a certain income or profit during the period in question, and of necessity it assumed the burden of proving its contention. Can it discharge this burden of judicial proof by invoking an administrative rule of its own creation? Were evidence of actual value wholly impossible, warrant for the application of the rule might be found in necessity. So, too, it might be that from slight or remote evidence, such as that during a period of years there was a gradual and apparently uniform development of surrounding conditions bearing upon the value of specific property, which physically remained unchanged, the difference between the selling price at the end of the period and the cost at the beginning, could reasonably be distributed over the entire period, without specific evidence of value in any given year. But such apportionment would rest upon a fair inference of fact,

while the rule here put forth by the Government is of universal application, without any proofs whatsoever, or any justification in necessity, and rests upon a pure presumption. I am inclined to think the case is not appropriate for the recognition of such a presumption.''

''By their proofs the defendants have quite conclusively shown that in 1901 the property in question was of a value approximating the price for which it was sold on March 31, 1910. If then the value of property presumptively moves from one known point to another, in a straight line, in computing the value as of January 1, 1909, should we not draw a straight line from 1901, instead of from 1887, to March 31, 1910? The actual value in 1901 being shown, only by abandonment of all semblance of reason or necessity, can it be assumed that before 1909 the value got back to the straight line drawn from 1887 to 1910.''

UNITED STATES v. CEDARBURG MILK CO. et al.

(U. S. District Court, E. D. Wisconsin, November 1, 1922)
(288 Fed. 996)

Record: Act of 1918. Suit to collect taxes. Decree for plaintiff.

Facts: The Cedarburg Milk Company sold all its assets, with certain exceptions, to the Gridley Dairy Company, for a consideration of $50,000 cash and $150,000 par value of the capital stock of the latter company. The stock was issued directly to the stockholders of the Cedarburg Milk Company and the cash was used to pay all outstanding indebtedness and to retire its preferred stock. It delivered all its cancelled stock to the Gridley Dairy Company. An assessment was later made against the Cedarburg Milk Company based upon the gain derived from the sale of capital assets.

Question: Were the defendants' contentions correct that, (1) there was not a sale but a merger; (2) the Cedarburg Company was not taxable because it did not actually receive this stock of the Gridley Dairy Company; (3) the transaction took place over a year before the passage of the Revenue Act of 1918 and

the retroactive features of the Act were not applicable to the case; and (4) the Cedarburg Company was not taxable, but that any tax must be based upon the distributive shares in the hands of the stockholders?

Decision: "The facts, without controversy, show that the Cedarburg Milk Company, on a sale or other disposition of its property, made a gain. The taxability of such gain is not to be avoided by the corporation upon the theory that, in a sense, its property became merged with the property of the defendant Gridley Dairy Company. The contract entered into by the corporation, deals exclusively with its transfer of its property, and the circumstance that such contract bound the Gridley Dairy Company to increase its capital stock and issue a part of it to the Cedarburg Milk Company 'or to such persons as it may designate,' simply emphasizes the transfer as a corporate act of disposition as upon ordinary sale. Clearly, the corporation cannot affirm such disposition, yet claim that it had no right, under the law of Wisconsin, to stipulate for part of the consideration in corporate stock of the vendee, wherefore taxability is avoided."

UNITED STATES v. CERECEDO HERMANOS Y COMPANIA

(U. S. Supreme Court, April 6, 1908)
(209 U. S. 337)

Record: Tariff act of 1897. Protest against classification of imports for duty. The Board of Appraisers decided in favor of the protest. The district court for Porto Rico affirmed the board's decision. Appeal. Reversed.

Facts: The facts involved the classification for duty of certain wines which were imported.

Question: What weight should be given to treasury decisions and rulings?

Decision: "We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. * * * And we have decided that the reenactment by Congress, without change, of a statute, which had previously received long-

continued executive construction, is an adoption by Congress of such construction.''

UNITED STATES v. CHICAGO & EASTERN ILLINOIS RY. CO.

(U. S. District Court, N. D. Illinois, E. D., April 12, 1924)
(298 Fed. 779)

Record: Revenue Act of 1916. Suit in equity by the government for taxes. Motion of defendant to dismiss. Motion denied.

Facts: The suit was brought after three years had elapsed, and it was contended that it was barred by limitation. The business of the railroad company was being conducted by a receiver appointed in a foreclosure proceeding, and the contention was made that the income was not subject to tax .

Questions: (1) Was the suit barred by the statute of limitations?

(2) Was the income of a railroad operated by a receiver appointed in a foreclosure proceeding subject to the income tax under the law of 1916?

Decision: (1) Defendant contended that the 1916 Act fixed a three-year period of limitation. The government contended that the 1921 Act, extending the limitation to five years, was retroactive. Congress has the power to remove a statute of limitation. Defendant further contended that, as the 1921 Act was enacted more than three years after the receiver filed his return, a lien thereunder would violate vested rights. But the court said: ''Plaintiff may be denied its lien and still be entitled to recover the amount of its tax.''

''It further appears that the Act of 1916 above referred to was merely a time limitation upon the Government's right to levy and collect taxes by summary proceeding, and was not intended to and did not limit the time in which it could proceed, in an action at law or a suit in equity (the necessary facts appearing), to collect the amount of its tax.''

Furthermore the acts of 1916 and 1921 provided an exception to the time limitation in cases of false or fraudulent returns

and "the Government has asserted facts which bring the case within the exception above noted."

(2) The argument that the income earned during the receivership could not be subjected to the income tax was rejected upon the authority of a number of cases cited, including Union Trust Co. v. Illinois, etc., R. R. Co., 117 U. S. 434. "More serious is the urge that Congress did not impose a tax upon the incomes of corporations operated by a court through a receivership." The court then quoted from sections 8 (c) and 13 (c), regarding returns and payment of tax by receivers. "I can not escape the conclusion that when the Congress, by section 1, levied 'upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax,' etc., and by section 10 levied a tax upon 'the total net income of every corporation,' it was intended to include receivers of individuals and corporations. In fact, the question of Congressional intent is hardly open to serious doubt, but defendant insists that Congress failed to enact such intention, and that another instance of omission such as was considered in Smietanka v. First Trust and Savings Bank, 268 Fed. 230; s. c., 257 U. S. 602 [ante 979], and United States v. Field, 255 U. S. 257 [ante 538], is presented.

"I cannot reach any other conclusion than that Congress in amending the 1916 Act in the respects heretofore mentioned, enlarged the definition of the individuals and the corporation against which the tax was levied by sections 1 and 10 of the Act, to include receivers of such individuals and corporations."

UNITED STATES v. CONSUMERS GAS TRUST CO.

(U. S. Circuit Court of Appeals, 7th Cir., January 2, 1906)
(142 Fed. 134)

Record: Section 27, War Revenue Act of July 13, 1898. Suit for the recovery of taxes paid. Judgment for the company. Writ of error. Affirmed.

Facts: The company is an Indiana corporation, its business being to secure from wells natural gas and sell it directly to its

consumers. For the purpose of conveying the natural gas from its wells to its consumers, it owned a system of pipe lines extending from seven to sixty miles from the city to the wells. September 17, 1902, the company was assessed an internal revenue tax of $763.01, purporting to be upon receipts from the pipe lines. The company claimed the tax was in fact levied upon the receipts from its entire business of mining, pumping, piping, sale and delivery of the gas to its customers. This tax was exacted under protest. A claim for refund was rejected.

Question: Was the company taxable?

Decision: Section 27 of the act of June 13, 1898, exacts a tax from all persons engaged in transporting oil or other products through the pipe lines owned or controlled by the transporter on the excess over $250,000 of annual receipts. "The business of mining natural gas and selling it to customers was not taxed. That was the only business in which the defendant in error engaged or had authority to engage, and from that business alone its entire income was derived." The judgment for the company was affirmed.

UNITED STATES v. COOPER et al.

(U. S. District Court, N. D. Iowa, E. D., February 26, 1923)
(288 Fed. 604)

Record: Indictments for false and fraudulent returns, perjury and conspiracy. Defendants presented petitions for the return of certain records, both corporate and personal, and filed pleas setting up the same facts as in the petitions. Government answered petitions and demurred to pleas. Petitions granted only as to private records under conditions, and demurrers sustained.

Facts: The Government secured certain books and papers, corporate and otherwise, for the purpose of verifying returns and possibly making other returns. Information obtained therefrom was turned over to the United States Attorney, who presented it to the grand juries which found the indictments. Defendants filed petitions stating that the production of the books and papers was compelled in order that they might be inspected for income

tax purposes; that after the Government had so obtained possession of the books and papers they were delivered, without defendant's consent, to officers of the Department of Justice, who laid them before the respective grand juries which found the indictments; that upon such evidence only the indictments were brought; and that such acts were in violation of the Fourth and Fifth amendments of the Constitution regarding unreasonable searches and seizures and compelling a defendant to be a witness against himself in a criminal case. The petitions asked an order commanding the return of the books, etc., and suppressing and restraining the use thereof in evidence on the trial of the indictments, etc.

Questions: (1) When knowledge has been gained from books and papers obtained by taxing officials for tax purposes and then used as a basis for criminal prosecutions, may such books, etc., be suppressed as having been obtained by an unreasonable search and seizure?

(2) To what extent should affidavits be heard?

(3) Should the demurrers be sustained?

Decision: (1) Corporate records are not such private records of an officer of the corporation as are included in the rule laid down in Boyd v. United States, 116 U. S. 616 (ante 104) and therefore may not be required to be returned. Private books, etc., of defendants, if obtained as alleged, should be ordered returned, and suppressed as evidence, including all leads and clews depending thereon.

(2) As the hearing and arguments were with the understanding that they pertained to the demurrers and the legal sufficiency of the petitions for the return of the books, etc., affidavits should not be heard.

(3) As the pleas concede that a very substantial part of the evidence before the grand jury was evidence other than that contained in the private papers, etc., the demurrers must be sustained.

UNITED STATES v. DEMOS

(U. S. District Court, S. D. Florida, July 10, 1923)
(291 Fed. 104)

Record: Defendant was indicted for attempting to defeat and evade a tax, and for perjury in subscribing to the oath on a tax return. Demurrer of defendant sustained and motion to quash indictment granted.

Facts: The charge of perjury was predicated on the amount of the tax due computed according to the table on the return. It was not alleged that any item of the return was false, but that the computation therefrom was incorrect.

Question: Was the indictment sufficiently specific to be sustained?

Decision: "To my mind the wording of the indictment conveys the meaning that because the return contains the computation of the amount due, based upon the items of income, and this amount is too little, the items being admittedly correct, therefore perjury has been committed. * * * It seems to me that the indictment must point out some material fact sworn to, which is false within the knowledge of the defendant, or some fact affirmed by the defendant, which he does not believe to be true. * * * It it is not enough to say that it is false and fraudulent. It must be stated wherein it is false and fraudulent."

UNITED STATES v. EYGES

(U. S. District Court, D. of Massachusetts, January 10, 1923)
(286 Fed. 683)

Record: Action of the United States to recover from defendant personally an income tax assessed against a bankrupt for whose estate defendant was trustee. Judgment rendered for defendant.

Facts: The defendant was trustee for the Colonial Grocery Company, bankrupt. At the time of the adjudication in bankruptcy certain taxes were due and unpaid. The defendant received money sufficient to pay the tax but did not do so. The

Government did not file a claim in the bankruptcy proceedings and did not call the matter to the trustee's attention.

Question: Was the trustee personally liable for distributing the assets of the bankrupt without paying the taxes?

Decision: "Where the tax is not brought to the trustee's or the court's attention, and he does not know of it, and no order is made for the payment of it, and he distributes the assets in accordance with the orders of the bankruptcy court, it would be unjust and would be going beyond what the statute contemplated to hold that he is personally liable." The court distinguishes this case from cases where tax is assessed against a trustee or an estate and cases in which, with knowledge of the tax, the trustee failed to have assets reserved to meet it.

UNITED STATES v. FALK & BROTHER

(U. S. Supreme Court, January 7, 1907)
(204 U. S. 143)

Record: Tariff Act of 1897.

Facts: (This case is important only for the rule of statutory construction below and the facts are not given.)

Question: What is the effect of the practical re-enactment of a statute which has received a long-continued and uniform construction by the Department?

Decision: "The attorney general having construed the provision of Section 50 of the Act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of Section 33 of the Act of 1897 and intended to make no other change than to require as the basis of duty the weight of the merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse."

UNITED STATES v. FIDELITY TRUST CO.

(U. S. Supreme Court, December 4, 1911)
(222 U. S. 158)

Record: Acts of June 13, 1898, and June 27, 1902. Suit in the Court of Claims to recover a portion of a succession tax paid. Judgment for plaintiff. Appeal. Reversed.

Facts: The Trust company was residuary legatee, as trustee, under a will to hold the fund and to pay the net income to testator's niece during her life. June 8, 1900, the trust company made a return, giving the value of the residuary estate. Mortuary tables were used and the niece's interest was valued at over $74,000, and an inheritance tax of over $5,000 was assessed and paid. Up to July 1, 1902, the tax on the payments made to the niece on the income, deducted from the whole tax assessed, left over $4,000, for which this suit was brought, under the later statute which provided for refund of "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested" prior to July 1, 1902.

Question: Had the legacies become vested so that the whole amount thereof was taxable?

Decision: It was argued that "only so much of the life interest of the niece as she had received before the date mentioned had vested in the sense of the clause. We are of opinion that this argument cannot be maintained. The interest of the niece was not a contingent right to income as it should accrue in her lifetime; it was a vested life estate in a fund, changing in investment at the discretion of the trustee, but retaining its equitable identity."

When the statute speaks of "interests absolutely vested in possession we presume that it uses familiar legal expressions in their familiar legal sense. It deals in terms with the interest, that is, the legal unit of right, not with the money received before a given moment."

UNITED STATES v. FIRST NATIONAL BANK OF MOBILE

(U. S. District Court, S. D. Alabama, January 11, 1924)

(295 Fed. 142)

Record: Revenue Act of 1921, sections 1300, 1308 and 1310 (a). Petition for order requiring bank to furnish information as to deposits and investments by a depositor and his wife. Order issued. (Appealed to Supreme Court.)

Facts: Section 1308 authorizes the Commissioner to require the testimony of any person having knowledge, to ascertain the correctness of any return, and section 1310 (a) provides that in such case the District Court shall have power to compel the attendance of witnesses, testimony and production of books. Section 1300 requires the taxpayer to keep records and render sworn returns. The petition stated that Hanlon and wife had not made correct statements of their incomes for the years 1918 to 1922, inclusive; that the bank's books contained information which would be of material assistance in arriving at this information; that the president and other officials of the bank had failed and refused to respond to summons, and asked the court to require such testimony and the production of accounts.

Questions: (1) Does the Fourth Amendment to the Constitution of the United States as to unreasonable searches and seizures authorize refusal by a third party to produce documentary and other evidence as to information in his possession relevant to the inquiry?

(2) May a bank be required to testify regarding an account of a depositor and his investments and dealings, and to produce its records in regard thereto without its first being shown that the deposits were not of the money of others or of principal and not income, etc.?

Decision: (1) The Fourth Amendment to the Constitution of the United States protects parties to criminal prosecutions against unreasonable searches and seizures, and does not authorize a third party who has books and papers relevant to an inquiry to refuse to produce them.

(2) It may be that the entries in the bank's books, without more, are inadmissible as showing income received by Hanlon and his wife, but the bank not only refuses to produce the books but to have its officer testify as to the facts. If Hanlon and wife are shown by the testimony to have deposited funds at various dates and to have made investments in securities, the entries in the books in connection with the testimony of officers of the bank as to transactions will be both material and relevant to show moneys or income received. If the money was received as an agent for others, or if it was principal and not income, that may be explained, but until explained the deposits tend to show income received. The Government has the right "to require any of the employees or agents of a bank who know facts as to deposits or investments or any dealings of parties who owe income taxes to testify to the entries made on the books of the bank as to such transactions so the Government may be correctly informed as far as possible of the income which has been received by its citizens."

UNITED STATES v. GOELET

(U S. Supreme Court, February 24, 1914)
(232 U. S. 293)

Record: Section 37 of the Tariff Act of 1909. Certificates from the U. S. Circuit Court of Appeals presenting the question whether the excise on the use of foreign-built pleasure yachts may be collected from an owner permanently domiciled in another country. Answered in the negative.

Facts: Excise duties were levied on a foreign-built yacht for the years ending September 1, 1909, and September 1, 1910. The facts were similar to those in the case of United States v. Billings, 232 U. S. 261 (ante 92), except that the "owner of the yacht, at least for a year prior to the levy of the tax, was domiciled in a foreign country, and that the yacht whose use was taxed had a permanent situs in such country, and, so far as the levy for 1910 is concerned, that state of things, as shown by the certificate, was expressly covered by the findings of fact; and if the opinion of the trial court be considered, it will appear that it was one of these peculiarities of fact; that is, the permanent

domicil abroad, which led that court, instead of deciding in favor of the tax, to hold that as to both periods it was unauthorized by the statute.''

Question: Does the statute provide for the payment by a citizen of the United States who has a permanent residence and domicil abroad of an excise duty because of the use by him, as owner or charterer under the terms of the statute, of a foreign-built yacht?

Decision: The taxing power ''is not usually applied to those even albeit they are citizens, who have a permanent domicil or residence outside of the country levying the tax. * * * Considering the text, we search in vain for the express declaration of such authority. True, it is argued by the United States, that as the tax is levied on any citizen using a foreign-built yacht, and as any includes all, therefore the statute expressly embraces a citizen permanently domiciled and residing abroad. But this argument in effect begs the question for decision, which is whether the use of the general words 'any citizen,' without more, should be considered as expressing more than the general rule of taxation; or, in other words, can be treated without the expression of more as embracing the exceptional exertion of the power to tax one permanently residing abroad. * * * The provisions of the income tax law of June 30th, 1864, expressly extended that tax to those domiciled abroad, and a like purpose is beyond doubt expressed in the income tax of 1913.''

The statute provides ''that the tax shall be levied 'by the collector of customs of the district nearest the residence of the managing owner,' etc.,'' and the consequence of such command ''is to associate residence with citizenship, and establishes such a relationship between them as to bring about the result which we have just stated.''

The question was answered in the negative.

UNITED STATES v. GRAHAM

(U. S. Supreme Court, January 21, 1884)

(110 U. S. 219)

Record: Suit in Court of Claims for mileage. Judgment for plaintiff affirmed.

Facts: The navy regulations provided that "for travelling out of the United States the actual expenses only are allowed." The Act of 1876 provided "the sum of eight cents per mile shall be allowed."

Question: Did the departmental regulations prevail?

Decision: "Such being the case, it matters not what the practice of the department may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such a construction begun so early and continued so long would be in the highest degree persuasive, if not absolutely controlling in its effects. But with language clear and precise and with its meaning evident there is no room for construction and consequently no need of anything to give it aid."

UNITED STATES v. HEALEY

(U. S. Supreme Court, December 2, 1895)
(160 U. S. 136)

Record: Acts of 1877 and 1891 and section 2357, R. S. Suit in Court of Claims for amount paid for land in excess of what receiver was entitled to demand. Judgment for plaintiff. Appeal. Reversed.

Facts: At the time of filing his declaration as to the public lands he wished to secure, the plaintiff "being so required, without protest and without taking any steps for relief against the demand of the receiver," paid the sum of $319.60, or 50 cents per acre. When he had made satisfactory proof of reclamation of the land he paid without protest $2.00 per acre additional. Later he sued to recover one-half of his total payment. Section 2357, R. S., provided that alternate sections of public lands should be sold at double price, but this rule was not enforced as to "desert lands," such as were purchased by complainant. He had been required to pay the double price. There was drawn in question regulations issued by the Interior Department.

Question: To what extent are regulations of the Department binding?

Decision: "If, prior to the passage of the Act of 1891, the Interior Department had uniformly interpreted the Act of 1877 as reducing the price of alternate reserved sections of land along the lines of land-grant, being desert lands, from $2.50 to $1.25 per acre, we should accept the interpretation as the true one, if, upon examining the statute, we found the meaning to be at all doubtful or obscure. But as the practice of the Department has not been uniform we deem it our duty to determine the true interpretation of the Act of 1877, without reference to the practice in the Department."

The court decided that there was no authority for selling the lands in question at less than the price obtained.

UNITED STATES v. HINES
IN RE MINOT AUTO CO., INC.
(U. S. Circuit Court of Appeals, 8th Cir., April 21, 1924)
(298 Fed. 853)

Record: Bankruptcy Act and rules of court. Claim for tax against bankrupt estate. Part of claim allowed. Government's right to petition for review after expiration of time allowed by rules was denied. Affirmed.

Facts: Hines was trustee in bankruptcy of the Minot Auto Co., Inc., which was adjudicated bankrupt on February 11, 1922. On March 23, 1922, the Commissioner assessed income taxes against the company for 1917 and 1918, which, with penalties, aggregated over $12,000. On March 27, 1922, the collector filed claims for these taxes and the trustee filed a petition with the referee, assailing the assessments as illegal, alleging that proper returns had been filed and the taxes paid, asking for an order on the United States to show cause why the assessment should not be declared illegal, etc. The referee ordered the United States to show cause accordingly. On April 3, 1922, the Government by its attorney appeared specially and objected to the jurisdiction of the referee. The referee found that almost $2,000 was owing, and denied the claim for the rest. The time for filing a petition for review under the rules of the District Court in question was fifteen days, and expired on May 5, 1922. Thereafter the referee

distributed the estate. He ordered the trustee to pay the taxes allowed, including federal taxes, and this practically exhausted the estate. These tax payments were accepted by the several taxing bodies.

On June 26, 1922, on an ex parte application, an order was obtained, extending the time for filing a petition for review, and such a petition was filed on June 27. The trustee objected to the hearing of this petition on the ground that the time had expired for such a review and because the Government was estopped from claiming more after having accepted the payment made. The court set the order aside which granted the extention of time. Then the Government petitioned the court to revise the latter order.

Question: Was the United States bound by the order and the rules of court?

Decision: "The question whether or not the order should be vacated was one addressed to the discretion of the court below, and the order made must be sustained unless it can be said on the record that the action of the court in vacating it amounted to an abuse of discretion. No such claim is made and on the record none such could be made."

That prior bankruptcy acts did not bind the United States may be conceded, "but the Bankruptcy Act of 1898 evinces a change of policy in that respect on the part of Congress and is binding upon the Government of the United States."

When the United States is a litigant, the court rules are as binding upon it as upon any other litigant.

"The record in this case thus affirmatively shows that after a contest before the Bankruptcy Court, the amount the petitioner was entitled to receive and the respondent was in duty bound to pay, was determined by the court. There was no amount whatever conceded to be due. The whole matter was in controversy. Our attention has not been directed to a case, nor have we been able to find one, holding that where under such circumstances the amount paid was determined by a court or competent jurisdiction to be the full amount of the tax, that the party in whose

favor the judgment was entered and who received the sum so fixed, could thereafter prosecute an appeal therefrom. * * * We are of the opinion that the petitioner by receiving and retaining that which the Bankruptcy Court determined was the full amount of the taxes, thereby waived its right to have the order of April 20, 1922, reviewed."

UNITED STATES v. HODSON

(U. S. Supreme Court, December, 1870)
(10 Wall. 395)

Record: Revenue Act, June 30, 1864. Suit by United States for penalty of a bond, alleging breach of conditions. Judgment for defendant. Writ of error to U. S. Circuit Court for Wisconsin. Reversed.

Facts: Revenue Act of June 30, 1964, Section 53, provides that any person required by law to be licensed as a distiller shall give bond to the United States. The Government alleged breaches of several conditions in the bond given by Hodson, one such condition being that the distiller keep a record of the gallons distilled, etc.

Question: How should revenue acts be construed?

Decision: "Revenue statutes are not to be regarded as penal, and therefore to be construed strictly. They are remedial in their character, and to be construed liberally to carry out the purpose of their enactment."

"Where it [the bond] is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped * * *."

UNITED STATES v. HVOSLEF et al.

(U. S. Supreme Court, March 22, 1915)
(237 U. S. 1)

Record: Section 25, War Revenue Act of June 13, 1898, and Act of July 27, 1912. Suit to recover stamp taxes paid. Judgment for plaintiff. Writ of error. Affirmed.

Facts: The stamps were required upon certain charter parties, "exclusively for the carriage of cargo from ports in the states of the United States to foreign ports, and the imposition of the taxes was held to be in violation of Sec. 9, article I of the Constitution of the United States, which provides: 'No tax or duty shall be laid on articles exported from any state.'" The suit was brought under paragraph 20 of section 24 of the Judicial Code, sometimes referred to as the Tucker Act.

Questions: (1) The claim for refund having been rejected, was the remedy of the claimants against the collector and not against the United States?

(2) Is it necessary to the jurisdiction of the court under section 5 of the Tucker Act that suit be brought in the district where the plaintiff resides?

(3) Could such a tax be validly laid upon charter parties exclusively for the carriage of cargo from state ports to foreign ports?

Decision: (1) The court reviewed the history of pertinent legislation since the passage of the War Revenue Act of 1898, and after referring to the later provisions for repayment, whether or not protest had been made and without regard to the statute of limitations, said: "It thus appears that the act of 1912—upon which the present claim is based—was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding the described claims, and it follows that these claims must be deemed to be founded upon a law of Congress within the meaning of the provisions of the Tucker Act, now incorporated in the Judicial Code."

The court then referred to the provision for the refunding of taxes paid on contingent interests described in the Act of June 27, 1902. "It is urged by the government that Congress intended to limit the act of 1912 to the refunding of death duties erroneously or illegally assessed under Sec. 29 of the war revenue act. Reference is made to the legislative history of the statute, but the contention lacks adequate support. See House Reports,

62d Cong. 2d Sess., Report No. 848, June 6, 1912. While the pendency of claims for the refunding of such taxes may have induced the passage of the act, its terms were not confined to these. On the contrary, after providing for the claims arising under Sec. 29, Congress added the further clause making express provision for the presentation of claims for the refunding 'of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act;' and the Secretary of the Treasury is directed to pay to those who duly present their claims and establish the erroneous or illegal collection 'any sums paid by them * * * to the United States under the provisions of the act aforesaid.' We are not at liberty to read these explicit clauses out of the statute."

(2) After referring to allegations in the petition as to the particular district, the court said: "But assuming that the subject-matter was within the jurisdiction of the court, the requirement as to the particular district within which the suit should be brought was but a model and formal one, which could be waived, and must be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits."

(3) Referring to the constitutional provision that "no tax or duty shall be laid on articles exported from any state," the court said: "The prohibition relates only to exportation to foreign countries and is designed to give immunity from taxation to property that is in the actual course of such exportation. This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the framers of the Constitution that 'the process of exporting the products of a state, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation.'" After referring to several decisions on the subject the court said: "Under this established doctrine, we are of the opinion that the

tax upon these charter parties cannot be sustained. * * * Again, it is contended that the tax bore only incidentally upon exportation. It was to be paid on all charter parties of vessels having a 'registered tonnage.' But, aside from any question as to the scope of this provision, the tax as applied to the charter parties here in question was nothing else than a tax on exportation, and to this extent was, in any event, invalid."

UNITED STATES v. INDIANAPOLIS & ST. LOUIS R. CO.

(U. S. Supreme Court, March 16, 1885)

(113 U. S. 711)

Record: Act of July 14, 1870. Foreclosure suit resulting in sale, which was confirmed by the court. The United States intervened and asked that certain taxes be first paid out of the proceeds. Denied. Appeal. Affirmed.

Facts: Certain interest coupons on the mortgage bonds had been paid in September and November, 1870, and January, 1871. The court below held that the act of July 14, 1870, did not impose an internal revenue tax on interest coupons of the bonds of the railroad company payable and paid during the last five months of that year; and that the law did not impose an internal revenue tax on interest coupons of such bonds payable and paid on the first day of January, 1872. The United States acquiesced in the judgment in respect to the first of these claims, but contended that the act of July 14, 1870, imposed a tax upon interest coupons that were paid out of the corporation earnings for 1871, although such payment was not due nor made until January 1, 1872. This question depended upon the construction of section 15 of the act of 1870, which provided "that there shall be levied and collected, for and during the year 1871, a tax of two and one-half per centum on the amount of all interest or coupons paid on bonds or other evidence of debt," etc.

Question: Did the statute tax interest neither payable nor paid in 1871?

Decision: "In construing this section in Railroad Co. v. U. S. 101 U. S. 550, the court said: 'The interest in this case was

neither payable nor paid in 1871, and, as the tax is not leviable or collectible until the interest is payable, we see no way in which the company can be charged on this account. The tax is not on the interest as it accrues, but when it is paid. No provision is made for a pro rata distribution of the burden over the time the interest is accumulating; and as the tax can only be levied for and during the year 1871, we think, if the interest is in good faith not payable in that year, the tax is not demandable, either in whole or in part.' This decision covers the present case. The claim of the United States is not for a tax on dividends or gains, but is distinctly for a tax on interest accruing on the bonds of the railroad company, and which was not payable nor paid until after the year 1871, for and during which the act directed it to be levied and collected. We do not perceive that the liability of the corporation for tax on this interest, as such, is affected by the circumstance that the interest was paid out of the earnings made in the previous year."

UNITED STATES v. JOHNSTON

(U. S. Supreme Court, June 9, 1888)

(124 U. S. 236)

Record: Suit in the U. S. Circuit Court against Johnston to recover the value of cotton which came to his hands as an assistant special agent of the Treasury Department and which it was alleged he had converted to his own use. Judgment for defendant. Writ of error. Affirmed.

Facts: The defendant became such agent on the 8th of May, 1865, under a written appointment by the Secretary of the Treasury. He was charged with the duty of receiving and collecting such cotton in certain counties in Mississippi as had been purchased by or was held on account of the so-called Confederate States Government, and of forwarding the same to agents of the department at Memphis or Mobile, as, in his judgment, was best for the Government. The case involved the construction of an Act of Congress.

Question: What weight should be given to the Treasury Regulations?

Decision: After referring to certain acts and Treasury Decisions, the court said:

"In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

UNITED STATES v. JONES

(U. S. Supreme Court, January 25, 1915)

(236 U. S. 106)

Record: Sections 29 and 30 of the Act of June 13, 1898; Acts of April 12, 1902, and June 27, 1902. Suit in Court of Claims for refund of a succession tax (49 Ct. Cls. 408). Judgment for plaintiff. Appeal. Affirmed.

Facts: Adelaide P. Dalzell died intestate June 28, 1902, survived by two daughters, her only next of kin. July 14, 1902, an administrator was appointed. Under the local law the debts of the intestate and the expenses of administration were to be paid out of the property, and what remained was to be distributed. In regular course the debts and expenses were ascertained and paid, and this left for distribution property of the value of $219,341.74. The collector of internal revenue then collected from the administrator, without protest from him, a succession tax of $3,290.12 upon the distributive shares of the daughters, and the tax was covered into the Treasury. About seven months after paying the tax the administrator sought, in the mode prescribed, to have it refunded under section 3 of the act of June 27, 1902, but the Secretary of the Treasury denied the application. The administrator then brought this suit and the court of claims gave judgment in this favor.

Under the taxing statute interests which were contingent and uncertain were not affected, but only those whereof the beneficiary had become invested with a present right of possession or enjoyment. Section 29 was repealed, effective July 1, 1902, but the

repealing act was not to prevent the collection of any tax imposed prior to that date. The Act of June 27, 1902, provided for the refund of "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first."

Question: Had the interest of the distributees become absolutely vested in possession or enjoyment prior to July 1, 1902?

Decision: Personal property of a decedent passes to the administrator, etc., for the payment of debts and expenses and the distribution of any residue to distributees, etc. "If the estate proves insolvent, nothing is to pass to them. So, in a practical sense, their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid."

The repealing act "deals with legacies and distributive shares upon the same plane, treats both as 'contingent' interests until they 'become absolutely vested in possession or enjoyment,' directs that the tax collected upon contingent interests not so vested prior to July 1, 1902, shall be refunded, and forbids any further enforcement of the tax as respects interests remaining contingent up to that date."

"The case of Hertz v. Woodman, 218 U. S. 205, [ante], is cited as making for a different conclusion, but it is without real bearing here. The refunding statute was not there in question and was not mentioned in the opinion. The case came to this court upon a certificate from the circuit court of appeals for the seventh circuit, the question certified being: 'Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902, relieve from taxation legacies otherwise taxable under sections 29 and 30 of the act of June 13, 1898, as amended by the act of March 2, 1901?' Thus it was expressly stated that the legacies were otherwise taxable, and the question propounded was merely whether they were relived from taxation by the fact that the testator died within one year of July 1, 1902, when the repealing act took effect. The inquiry was prompted by the provision in the amendatory act of March 2, 1901,

that the tax should be due and payable one year after the death. The answer was in the negative, it being held that the time when the tax was made due and payable was not determinative of when it was imposed. The opinion contains some language which, separately considered, gives color to the present contention of the government, but this must be read in the light of the question presented for decision and be taken as restrained accordingly. Besides, the opinion approvingly refers (p. 219) to Vanderbilt v. Eidman, supra, [post herein] as having 'conclusively decided' that the tax 'does not attach to legacies or distributive shares until the right of succession becomes an absolute right of immediate possession or enjoyment.' "

UNITED STATES v. KING COUNTY et al.

(U. S. Circuit Court of Appeals, Ninth Cir., July 3, 1922)

(281 Fed. 686)

Record: Revenue Act of 1917. Action by the United States to collect taxes on transportation. Judgment of the District Court of the United States for the Northern Division of the Western District of Washington for the defendants affirmed.

Facts: The defendant, a County of the State of Washington, operated certain ferry boats. A tax was assessed under Section 500 of the Revenue Act of 1917 equivalent to 8 per cent of the amount paid for the transportation of persons and 3 per cent of the amount paid for the transportation of freight.

Question: Was the the transportation by the ferry operated by the County subject to taxation under this section?

Decision: "It is true that in the present case the tax was not imposed directly upon the County of King but upon the persons paying to it the transportation charges; but it is obvious that the collection of those charges is at least one of the means which the County must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from other revenues or by general taxation." Hence, it seems plain that the tax here involved is an interference with and a burden upon the governmental functions of the State.

UNITED STATES v. KLEIN

(U. S. Supreme Court, December, 1871)

(13 Wall. 128)

Record: Act of March 12, 1863. Claim for proceeds of captured and abandoned property by administrators of deceased owner of the property, which was 664 bales of cotton. Judgment of Court of Claims for claimants. *Appeal. Affirmed.

Facts: The proceeds had been paid into the Treasury.

Question: Did the Court of Claims have jurisdiction of this action?

Decision: "It was urged in argument that the right to sue the Government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the Government as of individuals to fulfill its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855 * * *, for the triple purpose of relieving Congress, and of protecting the Government by regular investigation and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. * * * The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the Government and the citizens, from which appeal regularly lies to this court."

UNITED STATES v. KOLLER et al.

(U. S. District Court, W. D. Washington, S. D., March 25, 1921)

(287 Fed. 418)

Record: Revenue Act of 1918. Petition for attachment of the defendants to compel production of books and records. Motion to quash the order for the defendants to show cause why they should not produce their records denied and rule made absolute. (Appeal dismissed, 260 U. S. 757.)

Facts: Defendants conducted a skating rink, a charge of admission was made and also a "skate ticket" charge, which admitted the holder to the skating floor, and entitled him to the rental of a pair of skates, if he did not have his own.

Questions: (1) Is rental, after receipt, subject to an excise tax?

(2) Was the so-called "skate ticket" charge, rental for personal property and taxable as income only, or was it an admission charge subject to an excise tax of 10 per cent under the Revenue Act of 1918?

Decision: (1) The settled law is that rental received from personal property, after receipt, can only be taxed as income, and is not subject to an excise tax.

(2) The "skating ticket" charge is clearly "not a charge for skates, but rather a charge for admission to the skating floor, as in dancing." The fact that no person owning skates was admitted to the floor without payment of the charge, showed that the charge was not for rental of the skates, but for admission.

UNITED STATES v. MARION TRUST COMPANY

(U. S. Circuit Court of Appeals, Seventh Cir., January 2, 1906)
(143 Fed. 301)

Record: Acts of June 13, 1898, and April 12, 1902. Suit by Government for taxes against defendant as administrator of the estate of Mason J. Osgood. Judgment for defendant. Affirmed. (Judgment was affirmed on certiorari, without opinion, by a divided court, in 205 U. S. 539.)

Facts: The latter act repealed the former, the repealing act containing a saving clause that all taxes and duties imposed by the previous act should be a lien and charge, etc. Osgood died intestate, September 10, 1900. Owing to a dispute between certain persons who claim to be his heirs, and to the pendency of certain claims, the estate remained in process of administration until after the repealing act. Pending administration, the Government made no effort to collect the tax.

Question: Had the tax been imposed prior to the effective date of the repealing act, July 1, 1902?

Decision: "The statute failed to identify without ambiguity the thing to be taxed. We must go for light, therefore, to some of the collateral considerations. One of these, and in our judgment

a determinative one, is that the tax provided for is ad valorem as distinguished from being specific, and that an ad valorem tax is imposed only by assessment—an assessment being prerequisite to the incidence of the tax, 'the first step in the proceedings against individual subjects of taxation.' (1 Cooley, Taxation 3d Ed. 597.) But until the estate is ready to pass, without diminution to the heir, no assessment can take place. Until the administration is in such condition that the heir is in a position to take, the thing to be taxed is not definitely knowable—the tax itself is not determinable. True an estate likely to eventuate in distribution, becomes prospectively the subject of taxation under the War Revenue Act. But obviously it is not on a mere prospect, a thing coming, that the duty was intended to be laid. Obviously, the duty was intended to be laid on a thing already at hand—on a thing that can be measured, and in that way assessed. And this leads to the conclusion that at the time the War Revenue Act was repealed, no tax had been imposed upon the distributive share under consideration."

UNITED STATES v. MASON et al.

(U. S. District Court, S. D. Florida, July 14, 1924)
(Not yet reported)

Record: Bill by Government to subject lands to payment of estate tax against estate of Harry F. Mason, deceased, as a prior lien. Defendant Mitchell moved to strike out the answer of defendant Baine, which claimed a lien prior to Mitchell's. Motion denied.

Facts: Mitchell's motion to strike was based on the alleged ground that Baine's answer failed to set forth facts sufficient in law to constitute a defense against him.

Question: Should the answer be stricken out on this motion?

Decision: "Rule 33 of the New Equity Rules abolishes exceptions to answers and provides that the sufficiency of same may be tested by motion of the complainant, if the answer set up an affirmative defense.

"The answer of defendant Baine is an answer to the bill of complaint. It is not directed to any answer or claim therein pro-

pounded by his co-defendant, Mitchell. The right to test the sufficiency of the answer as a defense to the case made by the bill of complaint is vested by the rule in the complainant. The complainant is not the movant here. The rule, in my opinion, was never intended to and does not vest in a co-defendant the right to by motion test the answer of a co-defendant to the bill of complaint. If the cause proceeds to the point where it is necessary for the Court to decide the priorities of claims to the surplus funds, chancery proceedings are amply capable of passing upon those issues. That time, however, has not yet arrived.''

UNITED STATES v. McKENNEY

(U. S. District Court, W. D. Washington, S. D., November 3, 1923)
(293 Fed. 400)

Record: Act of 1918, Section 1314. Action against defendant for income tax. Judgment for plaintiff.

Facts: McKenney gave his uncertified check for the tax, drawn on the Kelso Bank. The check was deposited by the Collector and was forwarded to the Kelso Bank, which marked it paid and returned it to the drawer, sending its draft on another bank for the amount to the collecting bank. The draft was presented but was refused payment because of the failure of the Kelso bank.

Question: Is an income tax paid when the taxpayer has delivered an uncertified check for the amount to the Collector, the check not being paid because of the subsequent failure of the drawee bank?

Decision: ''Congress intended the person tendering a check in payment to the Collector to remain liable for the payment of the tax until it was actually paid in money. * * *

''If it be conceded to be negligence on the part of the Portland Bank to so send the check to the Kelso State Bank, yet under the language of the act, section 1314, before quoted, such negligence is not to be attributed to the United States. If agency there

be in the matter, the collectors and banks are agents of the tax-payers and not of the United States, until such time as the tax is paid in money."

UNITED STATES v. MERRIAM
UNITED STATES v. ANDERSON

(U. S. Supreme Court, November 12, 1923)
(263 U. S. 179)

Record: Act of October 3, 1913. Actions by the United States against the respective defendants to recover the amount of additional income taxes assessed. Demurrers were overruled by the United States District Court for the Southern District of New York and judgments were rendered against defendants (275 Fed. 109, ante 577). Upon writs of error from the Court of Appeals, these judgments were reversed (282 Fed. 851, ante 939). On writs of certiorari the Supreme Court affirmed the judgments of the Court of Appeals.

Facts: The will of Alfred G. Vanderbilt, who died May 17, 1915, provided in part as follows: "I give and bequeath to * * * Henry B. Anderson, $200,000; to Frederick L. Merriam, $250,000 * * *. I nominate and appoint * * * Henry B. Anderson and Frederick L. Merriam [and three others] executors of this my will and trustees of the several trusts created by this my will. * * * The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees."

The defendants qualified as executors and received the legacies above mentioned in 1915. Each made a return of income for the year 1915 but neither included the legacies so received.

The Act of 1913 imposed the tax on income derived from "compensation for personal service of whatever kind and in whatever form paid * * * including the income from but not the value of property acquired by * * * bequest * * *."

Question: Does the word "bequest" as used in the Act of 1913 include a bequest which is in lieu of all compensation as executor?

Decision: "The word 'bequest' is commonly defined as a gift of personal property by will; but it is not necessarily confined to a gratuity. * * * It does include the bequest here under consideration, since * * * actual service as a condition of payment is not required. A bequest to a person as executor is considered as given upon the implied condition that the person named shall, in good faith, clothe himself with the character. * * * He need do no more than in good faith comply with the condition in order to receive the bequest; and in that view the further provision that the bequest shall be in lieu of commissions is, in effect, nothing more than an expression of the testator's will that the executor shall not receive statutory allowances for the services he may render."

UNITED STATES v. NORTHWESTERN OHIO NATURAL GAS CO.

(U. S. Circuit Court, N. D. Ohio, W. D., October 27, 1905)

(141 Fed. 198)

Record: Section 27, War Revenue Act of June 13, 1898. Suit by United States for a tax claimed to be due because of the operations of the company during 1899 and 1900. Answer denying liability. Judgment for defendant.

Facts: The company was an Ohio corporation, owning and controlling a pipe line for transmitting natural gas. It was engaged in the business of producing, buying and selling to its consumers natural gas for fuel and lighting purposes. It also had pumping stations. The pipes transported the gas from its gas wells and natural gas which it purchased to its consumers.

Question: Was the company engaged in a business which made it subject to the tax?

Decision: "I have no difficulty in coming to the conclusion that, on the statement made, the defendant is not liable. In the first place, I am clearly of the opinion that the defendant is not a company engaged in a kind of business which makes it subject to the statute; and, in the second place, even if it was, the tax could only be levied on so much of its income as is derived from

the business of transporting gas and oil by means of a pipe line. It appears that the defendant is engaged, primarily, in the business of supplying natural gas to consumers in the city of Toledo. The price which it receives for the gas thus furnished is payment for the gas. Incidentally, it is necessary for the company to obtain a supply of gas by drilling wells in the neighboring country, and to transport that gas to the place of consumption. To thus transport the gas by means of pipes does not constitute the company a transporting company, nor is it thereby engaged in the business of transporting oil or gas by means of pipe lines. Such transportation is, in the most definite sense, merely incidental.''

UNITED STATES v. ONE THOUSAND FOUR HUNDRED AND TWELVE GALLONS OF DISTILLED SPIRITS

(U. S. Circuit Court, S. D. New York, February 24, 1873)

(Fed. Case No. 15,960)

Record: Information for violation of Section 45, Revenue Act of July 20, 1868. Defendant's demurrer sustained.

Facts: Section 45 requires rectifiers, etc., to keep certain books, etc., to enable revenue officers to learn various particulars in order to prevent frauds. Penalty for violations is fine and imprisonment. Section 96 provides generally that when any distiller or wholesale dealer, violates the act all his liquors, spirits, etc., shall be forfeited.

Questions: (1) Can the goods be forfeited under Section 96?

(2) How should a severe statute be construed?

Decision: (1) No. ''I concur with those who hold that the forfeiture here declared applies only to cases where no specific penalty or punishment is imposed by other sections.'' Section 45 which was violated has a specific penalty.

''Now to suppose that Congress by the 96th Section meant to declare that those who violated the law in any particular should notwithstanding the specific penalty or forfeiture previously declared in any other section, forfeit, also, all spirits owned by them, is to impute to them little less than an absurdity

* * *. I must hold that the forfeiture of spirits declared by the 96th Section does not apply to cases or offenses described in other sections, wherein a specific penalty or punishment therefor is imposed for the offense.''

(2) ''In construing a severe statute, declaring a heavy forfeiture those who are called upon to conduct their business affairs in view of all its provisions, ought to be fairly apprised of its requirements, and of its penalties, of whatever kind. They are bound to know the law but lawmakers owe to them the duty to make the law intelligible; and those whose business it is to construe or expound a law which is of doubtful or double meaning should not incline to the harshest possible meaning, when it is obvious that those to whom it is to be applied may well have been led to trust in another which is less severe, but equally satisfying its terms. This is not saying that laws of the kind in question are to be strictly construed in favor of the subject and against the state, but, only, that they should be construed with reasonable fairness to the citizen.''

UNITED STATES v. OSBORN et al.

(Supreme Court, District of Columbia, 1917)

(T. D. 2489)

Record: Harrison Narcotic Law. Petition for writ of mandamus directed to the Commissioner and the Secretary of Treasury of the United States commanding them to abrogate and cancel T. D. 2309 and all other decisions and regulations in conflict with the Harrison Narcotic Law, and commanding them also to make hereafter only such needful rules and regulations as might be necessary to carry the provisions of that act into effect. Petition denied.

Facts: Relator suffering from a cough consulted a physician who prescribed certain drugs. The prescription was filled but, when relator afterward returned, the druggist refused to refill the prescription because of T. D. 2309. The Commissioner ruled that only ready-made preparations were excluded from the oper-

ation of the act and that extemporaneous prescriptions were within the act.

Question: Will mandamus lie?

Decision: No. "Every citizen and every taxpayer is interested in the enforcement of law * * *; but that general interest is not a private interest and is not sufficient to authorize a private citizen to institute mandamus proceedings to secure from the appropriate officials the legal administration of such law. The mere fact that the relator desired to become a purchaser * * * of a narcotic drug and was refused them by a druggist because of the operation of T. D. 2309 would of itself give the relator no sufficient private interest to proceed by way of mandamus * * *"

"In this case the respondents have acted. They have exercised their judgment and discretion * * *. The exercise of such a power certainly cannot be said to be ministerial."

"The court might compel the Commissioner * * * and the Secretary * * * to make regulations to enforce the act, if they had not acted, and if such were needed, but it can not command them to exercise their discretion in formulating those regulations in a particular manner."

UNITED STATES v. PROCTOR

(U. S. District Court, S. D. Texas, December 20, 1922. On Rehearing March 8, 1923)

(286 Fed. 272)

Record: Income Tax Law of 1913. Action by United States against Proctor. Cause submitted on stipulation. Judgment rendered for tax and costs but without interest. On rehearing judgment was amended to include interest.

Facts: The tax originated out of an item which the taxpayer did not believe to be taxable, and as to which the Government was not then demanding payment of the tax. Later the Government not only claimed the tax, which the defendant admitted, but also interest at 6 per cent from June 30, 1914. The Act, how-

ever, provided for a penalty of 5 per cent and interest at 1 per cent per month which were effective only from the time when demand was made. No demand was made in this case. Defendant contended that the above provision for penalty and interest was exclusive as to liability for interest and that the Government could not resort to nonstatutory law to recover interest.

Questions: (1) When did the tax become due and payable?

(2) Was the tax a debt so as to draw interest from its due date?

Decision: (1) "* * * liability for income taxes arises * * * at the time the gains, profits, and income passed into the hands of the recipient * * * not at the time demand was made upon him, but at the time fixed by law, to wit, June 30, 1914, when the tax would have been collected * * *"

(2) At the original hearing, the court held that, in line with what it said was "settled by the universal current of authority * * * a tax is not a debt and that interest does not arise upon it, unless and except in accordance with the provisions of the statute * * *."

On rehearing the court reversed itself upon the authority of Billings v. United States, 232 U. S. 261 (ante 92), which, although conceding the current of authority pointed out above, holds that the United States rule, as opposed to the so-called State rule, was that interest accrued in all cases where equitably due, unless forbidden by statute; and that the right existed to sue for taxes as for a debt in every case where not prohibited by statute.

UNITED STATES v. SINGER

(U. S. Supreme Court, December, 1872)
(15 Wall. 111)

Record: Act of June 20, 1868, section 20. Suit on a bond. Plaintiff's demurrer to defendant's plea of unconstitutionality was overruled. Reversed.

Facts: It was contended that the 20th section, Act of June 20, 1868, "An act imposing taxes on distilled spirits and tobacco,"

if construed to levy a tax on 80 per cent of the producing capacity of the distillery, whether or not that amount had been actually distilled, was unconstitutional.

Question: Was the law unconstitutional?

Decision: The Act was held to levy such a capacity tax. "The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation, that is, it is assessed equally among all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

UNITED STATES v. S. NOVECK & COMPANY, INC.

(U. S. District Court, S. D. New York, June 13, 1924)
(Not yet reported)

Record: Act of 1790, as amended by the Act of November 17, 1921, and the Act of July 15, 1884, as amended by the Act of November 23, 1921. Indictment. Plea in abatement involving the statute of limitations. Plea held good. (Pending in Supreme Court.)

Facts: The company was indicted for violating a general revenue statute. The plea in abatement was made under the limitation in the Act of November 23, 1921.

Question: Does the limitation in the Revenue Act of 1921 apply to indictments brought under the general revenue statutes?

Decision: "The indictment is based upon the law that has developed into its present statute from the old original statute of 1790, as amended by the Act of the 17th of November, 1921. The Act of November 17th, 1921, is an amendment to what may properly be called a general statute; that is, a statute or law which applies to all cases coming within the class or classes of cases described or defined by it, except where some special or specific provision of law provides to the contrary, and/or subse-

quently enacted, with some special or specific other purposes in the mind of the legislative body enacting it.

"The Act of November 23rd, 1921, the act which is pleaded in this motion in abatement is, as by its terms indicated, and was by Congress passed for the simple, sole purpose to govern in cases brought for all alleged violation of the internal revenue laws, which is only one branch of the revenue system here, one branch of the source from which revenues are derived. It is apparent that the legislators had in mind the specific purpose of requiring prosecutions for its violation, or its alleged violation, if any, to be brought within the time or times prescribed by it according to the character of the offense."

The court further said: "A special law or a law designated by the legislative body enacting it to operate in a limitation or modification from the rule of action to be followed concerning the matter about which there has been legislation, supersedes or shall be a limitation upon any general statute that otherwise might govern; especially is that true when the special act has been passed and become operative at a date subsequent to the general act. The plea in abatement is good."

UNITED STATES v. STATE NATIONAL BANK

(U. S. Circuit Court, D. Minnesota, December Term, 1874)
(Fed. Cas. 16,380)

Record: Section 120, Act of June 30, 1864, as amended by the Act of July 13, 1866, re-enacted July 14, 1870. Suit by United States to recover penalty. Demurrer. Demurrer sustained.

Facts: The penalty was of $1,000 for not making or rendering a return of net earnings for the period between January 1, 1870, and June 30, 1870. (The complaint was lacking in the allegations indicated in the decision below.)

Question: Should the demurrer be sustained?

Decision: If the penalty is claimed under the 120th section, the complaint "should have alleged that the sum therein mentioned as net earnings, income and gains was dividends declared or excess of profits over such dividends added during the year to their

surplus or contingent fund. This is manifest, for the section imposes a tax upon two subjects: First, dividends due and payable; second, undistributed sums or excess over dividends which had been carried to a surplus fund. * * * If the penalty is claimed under 121st section of the act, the complaint should have charged that the defendant had neglected or omitted to make dividends or additions to its surplus or contingent fund within the period of time therein mentioned, and had failed to make the return required by this section. Only the earnings, income and profits of the defendant, not thus disposed of, were subject to a tax, and the penalty could only be maintained in case of a default of the president or cashier of the bank to make a list or return of such profits and payment of the tax imposed, on the first day of July, or within thirty days thereafter.'' The demurrer was sustained with leave to the plaintiff to amend.

UNITED STATES v. STATE NATIONAL BANK

(U. S. Circuit Court, D. Minnesota, 1874)

(Fed. Cas. 16,381)

Record: Sections 15, 16 and 17, Act of July 14, 1870. Suit by Government to enforce penalty of $1,000. Demurrer. Demurrer overruled, with leave to answer.

Facts: The dividends, etc., were alleged to be from earnings between July 1 and December 30, 1870. The bank refused to make returns as demanded, its counsel urging that, ''inasmuch as the first clause of the section enacts 'that there shall be levied and collected for the year 1871, a tax,' etc., it excludes the idea that any tax could be levied and collected in the year 1870.'' Penalty was claimed under the 16th section of the Act of July 14, 1870. A demurrer was interposed.

Question: Did the Act provide for levying and collecting a tax for the period in question?

Decision: ''The seventeenth section of the Act of July 14, 1870, * * * provided for the tax upon the earnings, income and profits of the defendant during the month of July, 1870, at the rate of five per centum; and the fifteenth section of the same act reduced this tax to two and one-half per centum, and limited its

continuance during the remaining portion of the year 1870 and the year 1871. There can be no doubt in our opinion in regard to the effect of the fifteenth section. The language is plain and unmistable. The defendant's counsel admit that this section imposed the tax at two and one-half per centum for the year 1871, but deny that the language used imposing the tax 'on the amount of all dividends of earnings, income,or gains hereafter declared by any bank,' etc., has the effect of imposing this two and one-half per centum tax upon the dividends declared, or undivided profits added to any funds, after August 1, 1870, and before the expiration of the year. In our opinion this view is not correct. The word 'hereafter' refers to a time after the passage of the act; any other limitation or qualification would render this word, according to the context, meaningless."

Admitting counsel's contention "still there is no inconsistency in the subsequent phraseology of the section. A tax could certainly be levied and collected in 1871, upon the earnings, income, etc., of 1870. This section fixed the period when the tax ceased, and imposed it upon the earnings, income and profits of certain institutions during the years 1870 and 1871. * * * If there was any ambiguity of language used in this section, and we should examine it in the light of all the surrounding legislation upon the subject of taxation of the earnings, income and gains of banks, and other institutions therein named, there could be no satisfactory reason assigned, or explanation given, why congress, having imposed the taxes up to August 1, 1870, should rescind them for the remaining portion of the year 1870, and renew them during the year 1871. The complaint states facts sufficient to show a failure to make a list or return, which, if true, would entitle the government to recover the penalty denounced by the act."

The demurrer was overruled with leave to answer in twenty days.

UNITED STATES v. STOWELL

(U. S. Supreme Court, January 20, 1890)
(133 U. S. 1)

Record: Sections 3258 and 3305, Revised Statutes and Act of February 8, 1875. Information for forfeiture of property. Held

by District Court for Massachusetts that property of third parties could not be seized. Affirmed by Circuit Court for Massachusetts. Writ of error. Reversed and remanded.

Facts: Dixon operated a brewery. He set up a still which was not registered, and no bond was put up, as required by law; the still was run with intent to defraud the Government of taxes. Dixon had mortgaged some of the property to Stowell which was seized by the Collector.

Questions: (1) Could the property of the third parties be taken?

(2) How should the revenue laws be interpreted?

Decision: (1) It being admitted that the business of a distiller was not carried on with the mortgagee's permission or connivance it follows that the mortgage is valid as against the United States. The reasonable construction of the statute is to forfeit "without regard to the question of ownership the distillery and distilling apparatus and all personal property found on the premises and used in the business there carried on; but, as to the real estate, to forfeit only the right, title and interest of the distiller, and of any persons who participate in or consent to the carrying on of the distillery."

(2) "By the now settled doctrine of this court, * * * statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties, or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed so as to carry out the intention of the legislature."

UNITED STATES v. SUPPLEE-BIDDLE HARDWARE CO.

(U. S. Supreme Court, May 26, 1924)

(265 U. S. 189)

Record: Revenue Act of 1918. Suit by the company in the Court of Claims to recover taxes paid. Judgment for plaintiff. Affirmed on appeal.

Facts: Biddle was elected president of the company. He had been with it for nearly twenty years. He was a man of ability, energy and initiative. The returns of the company indicated that under his management its business had been much increased. At the instance of the directors and the expense of the company, he took out insurance policies on his life aggregating $100,000, payable to the company. The latter intended thereby to secure its financial position in the event of his death. The company was assessed with a tax on the proceeds of these policies on the death of Biddle. It paid the tax and sued for its recovery. Section 213 of the Act of 1918 excepted from the gross income of individuals "the proceeds of life insurance policies paid upon the death of the insured to individual beneficiaries * * *." Section 233 (a) provided that the gross income of a corporation "means the gross income as defined in Section 213," with certain exceptions not here material. The Treasury Department held that the proceeds of these policies paid to the beneficiary, which was a corporation, were not exempt and were included as "gains * * * from any source whatever."

Question: Did the Act of 1918 exempt from taxation, proceeds of life insurance policies paid upon the death of the insured where the beneficiary was a corporation?

Decision: "We think the Treasury Department erred in assuming that Congress intended by sections 233 and 213 to distinguish between individual beneficiaries and corporate beneficiaries in including the proceeds of life insurance policies as within gross income. We think the two sections have no such purpose."

"Life insurance in such a case is like that of fire and marine insurance, a contract of indemnity. * * * The benefit to be gained by death has no periodicity. It is a substitution of money value for something permanently lost either in a house, a ship, or a life."

"The result of the construction put by the Government upon Sections 233, 230 and 213 would be to impose a double tax on the proceeds of the two policies in this case over and above $40,000, i. e., an income tax and an estate tax. Such a duplication even in an

exigent war tax measure is to be avoided unless required by express words.''

UNITED STATES v. TWO HUNDRED BARRELS OF WHISKY

(U. S. Supreme Court, December 3, 1877)
(95 U. S. 571)

Record: Act of July 20, 1868. Information against property as forfeited. Demurrer by defendants sustained. On writ of error to U. S. Circuit Court for Louisiana, judgment affirmed.

Facts: The property in controversy was seized as forfeited to the United States, by the Collector on the ground that the distiller had omitted to have packages containing more than twenty gallons each, inspected and stamped, in accordance with Section 25 of Act of July 20, 1868.

This case presents the question, whether property owned by and found upon the premises of a rectifier or wholesale liquor dealer can be seized as forfeited to the United States, under section 96 * * * because such rectifier or wholesale liquor dealer has knowingly and willfully neglected, omitted or refused to cause packages of distilled spirits containing more than twenty gallons each, filled for shipment or sale on his premises, to be gauged, inspected and stamped, in accordance with the provisions of section 25.

Question: May the liquor be forfeited for a violation of section 25 of the Act?

Decision: ''Section 25 does not specifically impose the duty upon the rectifier or wholesale dealer, of causing or procuring the filled casks to be gauged, inspected or stamped. It is made the duty of the gauger to do the gauging, inspecting and stamping, but not in terms, of the dealer, to cause it to be done. If there were nothing more, it would be clear that any omission of the rectifier or dealer to act in the matter would not be a cause of forfeiture. Section 96 was, however, undoubtedly intended to impose upon rectifiers and wholesale liquor dealers the duty of doing or causing to be done everything pertaining to their respective occupations which was necessary, in order to enable others acting under the law to do what

was required of them. If they failed in this, and there was no other penalty provided for the neglect, they were subjected to the provisions of that section. If, however, by any other section a specific duty was imposed on them, which, if performed, would enable the other parties to act in the proper manner, and a penalty was prescribed for the omission to perform such duty, they were not to be proceeded against under section 96. It was not intended by Congress in that section to add to the already existing penalties for an offense, but to provide for omitted cases only. The object evidently was to so contrive the machinery of the law that when one part was set in motion the rest must follow. * * * Now, section 57 provides that if packages of distilled spirits are found on his premises, containing five gallons or more each, which do not have upon them each mark or stamp required by the law, they shall be forfeited. This, then, is a specific penalty provided for the failure to procure or cause the stamping to be done on packages of five gallons and upwards; and it follows the packages wherever found. The unstamped packages in this case contained each twenty gallons or more.''

''The rules and regulation which the Commissioner of Internal Revenue is authorized by section 2 to prescribe cannot have the effect of bringing the case under the operation of the penalty provided in section 96, if it was already covered by section 57. The regulations of the Department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions.''

UNITED STATES v. UNION PACIFIC R. R. CO.

(U. S. Supreme Court, November 29, 1875)

(91 U. S. 72)

Record: Act of Congress, 1862. Action for interest on bonds prior to maturity. Judgment for defendant affirmed.

Facts: On large issue of bonds the United States claims that by virtue of the Act of Congress of 1862 defendant must pay interest prior to maturity.

Question: How shall the act be interpreted?

Decision: "In construing an Act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts in construing, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions of it."

UNITED STATES v. UPDIKE et al.

(U. S. District Court, D. Nebraska, Omaha D., August 15, 1924)
(Not yet reported)

Record: Revenue Act of October 3, 1917, and section 250 (d) of the Revenue Act of 1921. Suit by the Government for income taxes. Decree for plaintiff.

Facts: The Missouri Valley Elevator Company was organized in Nebraska, in 1910, and continued in business until July 31, 1917, when it was dissolved, and its assets were distributed to the persons who were then stockholders. The Government brings this suit in equity to compel the stockholders to account for the assets so received by them, to the extent of paying to the Government the amount of taxes which were assessed on account of the corporation's earnings from January 1, 1917, to May 31, 1917, under the provisions of the Revenue Act of October 3, 1917.

The corporation had made returns according to a fiscal year ending May 31, 1917, but after the dissolution of the corporation and the distribution of its assets to the stockholders, all accomplished about August 1, 1917, the position was taken by those who had been the managing officers that the provisions of the Revenue Act of October 3, 1917, were without application to the corporation so dissolved, its officers or its stockholders.

This was in accordance with a ruling of the Commissioner, but on November 17, 1917, this ruling was reversed, and on the authority of Brady v. Anderson, 240 Fed. 665 (ante 105) it was ruled that a corporation dissolved in 1917 prior to the approval of the Act of October 3, 1917, was subject to the tax imposed thereby. The court

quoted article 61 of regulations 33, which was promulgated in accordance therewith. The corporation's former secretary sent back the blank form for "Corporation income tax return" with a letter, reciting the dissolution of the corporation and the distribution of its assets after paying the income tax and excess profits tax for the fractional period of the year 1917 then ascertainable and pursuant to the returns of the corporation duly made, amended and filed. The letter further stated that the writer sent this communication because he was secretary of the corporation prior to its dissolution and because "I am aware of the regulation known as Article 61 of the Regulations in reference to the income tax of October 3, 1917 (but which I am advised is erroneous), and in order that a statement of the facts in this matter may be made for your records."

In November, 1919, after an investigation, the Commissioner assessed a tax in accordance with the rates of the Act of October 3, 1917, of over $34,000, which is the subject of this suit.

Questions: (1) Was the tax under the Act of October 3, 1917, applicable to the income of a corporation received within that year when such corporation was dissolved and its assets distributed prior to the passage of the Act?

(2) As the statute does not provide the method for collecting this tax, and as there is no person designated to make the return, does the tax fail?

(3) Were the former stockholders, to whom distribution of the assets was made, liable for such tax?

(4) Does the statute of limitations prevent the recovery of the tax in this case?

Decision: (1) The court quoted from United States v. McHatton, 266 Fed. 602 (ante 550), which held that a corporation cannot escape the duty of payment of taxes retrospectively imposed by dissolution and that those who gratuitously take all its property, may, to the extent thereof be held liable for the payment of such duties. Counsel did not contend that Congress had no power to impose a retrospective tax, but the contention was that Congress did not do so. Quotations from sections 4 and 10 of the Act of October 3, 1917, were given, and the court held that Congress had

expressed clearly its intent to tax revenues during the part of the year the corporation was in existence.

"But it is argued that because an income tax is a tax in personam it must fail against a corporation dissolved before the law imposing the tax was finally enacted." The same answer, that such taxes would not fail, was given here as was given in the decision in Shaffer v. Carter, 252 U. S. 54 (ante 448).

(2) It was argued that "because no way is set forth in the statute to ascertain the income or to assess or collect the tax, and no person is there designated to make return or payment, the tax must fail, * * *." Section 1003 of the act was quoted, in which provision was made for the collection of taxes where no method was specifically provided, such collection to be made in such manner as the Commissioner should prescribe, etc.

(3) The stockholders receiving the assets on distribution were trustees of a trust fund for the payment of claims existing against the corporation at the time of dissolution and this tax was such a claim.

"Regulations have been duly promulgated to the effect that reservation of funds to pay the tax must be made on dissolution of the corporation, and, failing that, the tax may be collected by suit against the stockholders. This regulation must be given the force and effect of law because it is in all respects reasonably adapted to the enforcement of the Act of Congress and is not in conflict with any statutory provision of law. Maryland Gas Co. v. United States, 251 U. S. 342" (ante 332).

(4) It was argued that the statute of limitations prevented a recovery in this case. "The salient feature of the statute of limitations incorporated in this section 250 (d) is that it can be set in motion and started to run only by the affirmative, honest act of the taxpayer and not otherwise. Prior statutes had either omitted limitations provisions altogether or had allowed mere lapse of time or official delay to destroy the Government's right, or had fixed the limitation's starting point at the time of a discovery by the Commissioner. But such policies are entirely abandoned in this Act, and nullum tempus occurrit regi as to any tax imposed by any of

the laws specified from 1909 to 1921 unless and until the taxpayer honestly makes and files his return under that law. Then and not until then time runs in his favor to the complete extinction of his liability at the end of five years in the case of the October 3, 1917, Act. If the taxpayer fails or refuses to make such a return as the law contemplates, or willfully makes a false and fraudulent one, proceedings will lie against him to recover the tax at any time." The Government's right continued despite the return of the blank form by the former secretary with the letter mentioned. "I find that the Act of October 3, 1917, supplemented by the proper regulations, required and obliged the corporation herein to make true and accurate returns on the particular form provided, namely, Form 1031, and under oath, so that the Commissioner could proceed to determine and assess the tax. Compliance was necessary before any question of limitations could arise. No such return having been made or filed the statute was never set in motion."

UTERHART et al. v. UNITED STATES

(U. S. Supreme Court, April 3, 1916)

(240 U. S. 598)

Record: Acts of June 13, 1898, and June 27, 1902. Suit in the Court of Claims for refund of federal succession taxes. Petition dismissed (49 Ct. Cls. 709). Appeal. Reversed and remanded with directions to enter judgment for claimants.

Facts: This case involved bequests under the will of Conrad Stein, deceased. It was brought under the Act of June 27, 1902, which provided for the refunding of so much of the taxes "as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two."

Several of his children, who were residuary legatees were minors on his death, April 6, 1900, and the youngest was a minor on July 1, 1902. All of them were living on the latter date. The tax assessed was over $17,000 and was based on the theory that each of the children had a vested 1/7 interest at the death of the decedent. The will was construed by the State Supreme Court and its decree stated "that *the whole* of his residuary estate, real

and personal, should, *so far as necessary*, be applied to the support and education of his minor children, Josephine Stein, Paula Stein, Ella Stein, and Carl Stein, during the minorities if Carl Stein survive such period." Then follows a clause to the effect that the trustees should apply the income to the support and education of the minor children until they respectively attain the age of twenty-one years, if Carl survive such period, and that on his attaining the age of twenty-one or sooner dying the testator gave, devised, and bequeathed the residue to the seven named (including Carl) in equal shares. A subsequent clause directs the executors and trustees "to apply so much of the rents of the real estate, and of the income of the personal estate *as shall be reasonable and proper,* to the support and education of the testator's said minor children during their respective minorities as aforesaid." They are empowered, during the minority of the minor children "to pay over by way of advance" to the seven, "in equal amounts or shares, *so much* of the capital of the testator's residuary personal estate, or the income thereof, *as in their judgment they may deem reasonable* so to pay over." And, finally, "the said executors and executrix and trustees shall not be compelled to make distribution of the principal of the estate or any part thereof, except in the exercise of their reasonable discretion until the said Carl Stein attains the age of twenty-one years."

Question: Were the interests of the children vested on July 1, 1902?

Decision: The court said that, it having been authoritatively decided by the New York Supreme Court that the trust would continue until the youngest child reached the age of twenty-one and that no child was entitled in the meantime to receive anything except in the discretion of the executors and trustees, "We are of the opinion that the interests to which the residuary legatees succeeded were contingent, and not vested prior to July 1, 1902, within the meaning of the refunding act as construed in previous decisions of this court upon the subject (Vanderbilt v. Eidman, 196 U. S. 480, [post]; United States v. Jones, 236 U. S. 106, [ante]), except with respect to such amounts as were actually paid out of the trust fund by the trustees prior to that date, in the exercise of

their discretion; the proper tax upon which, according to the findings, would have been $745.12."

The judgment was reversed and the cause remanded with directions to give judgment for the claimants for the excess tax collected.

VANCE v. McLAUGHLIN, COLLECTOR

(U. S. District Court, N. D. California, April 15, 1924)

(Not yet reported)

Record: Revenue Act of 1918. Demurrer to amended complaint overruled.

Facts: (None given, except those contained in the decision quoted below.)

Question: What is the basis of a loss on a sale of assets acquired prior to March 1, 1913, under the Revenue Act of 1918.

Decision: "The demurrer to the amended complaint is overruled. It is believed Congress meant what it plainly said, emphasized by the contrast between terms of pars. 1 and 2 of section 202a of the Act. And this decision is no wise inconsistent with the cases 255 U. S. [reference is to Goodrich v. Edwards, 255 U. S. 527, ante 234, and Walsh v. Brewster, 255 U. S. 536, ante 592]. They had to do with gains where were none; this, with losses actually suffered.

"For however values vary, there is no actual gain until sale and an amount realized in excess of costs. It is otherwise in the matter of losses. Any recession in value once accrued and vested is an actual loss, and if the property is sold at recession, the loss appears and has been incurred, even though the sale be in excess of cost. That is, prior to March 1, 1913, for $10; value that date $20; sale in 1919 for $15; the owner's loss is $5, though price received is $5 in excess of cost."

VANDERBILT et al. v. EIDMAN, COLLECTOR

(U. S. Supreme Court, February 20, 1905)
(196 U. S. 480)

Record: Acts of June 13, 1898, March 2, 1901, April 12, 1902, and June 27, 1902. Suit for refund of a succession tax. Demurrer.

Complaint dismissed. The case was carried to the Circuit Court of Appeals which certified certain questions to the Supreme Court, which were answered in the negative.

Facts: Vanderbilt died September 12, 1899, leaving a will which gave the residue of the estate to trustees for the use of his son, Alfred G., (a) to provide for his support during his minority, (b) any surplus income to be paid him when he became 21, (c) thereafter to pay all the net income to him until he became 30, when he was to receive one-half of the principal, and (d) thereafter to pay him the net income from the balance until he became 35, when said balance was to be turned over to him. If he should die before becoming 35, provision was made for the disposition of whatever had not been already turned over to him, to certain other children, varying according to certain contingencies. All the children were living when the suit was brought and Alfred G. was then over 22 years of age. The value of Alfred G.'s rights until he became 30, was appraised at over $5,000,000 and upon this sum the executors paid a tax under sections 29 and 30 of the Act of June 13, 1898, of over $115,000. Thereafter and subsequently to the passage of the Act of March 2, 1901, the Commissioner, considering that he had become liable to tax on the whole residue, if he lived to the ages of 30 and 35 years, respectively, assessed a tax based on that hypothesis. In making that assessment, as the mortality tables showed he had an expectancy of life beyond the age of 35 years, the Commissioner assessed the estate as one vested. A tax of over $426,000 was assessed. This was paid under protest and compulsion and the executors brought this suit after unsuccessfully asking a refund.

The circuit court sustained a demurrer to the complaint and dismissed the action (121 Fed. 590). The Circuit Court of Appeals stated the facts and certified questions to the U. S. Supreme Court.

Question: Was the tax applicable to the residue which Alfred G. might possess or enjoy in the future if he arrived at the ages specified?

Decision: The case of Knowlton v. Moore, 178 U. S. 41 (ante 289), was held not decisive of this question. The duties imposed in section 29 were of two classes, (1) on legacies passing directly, and

(2) on personal property transferred to take effect in possession or enjoyment after the death of the grantor. As to this second class, the liability for taxation depends "not upon the mere vesting, in a technical sense, of title to the gift, but upon the actual possession or enjoyment thereof."

In accord with its text "the act of 1898 was primarily construed by the officers charged with its administration as taxing only beneficial interests where the right to possess or enjoy had accrued. The rulings of the Internal Revenue Department to this effect were without deviation for several years. * * * The change of construction was made because the administrative officers deemed it was required by the amendment of March 2, 1901, to the Act of 1898." A ruling made by the Commissioner said: "The amendment to Par. 30 of the war-revenue law, approved March 2, 1901, which went into effect July 1, 1901, necessitated a change in this ruling, and on July 20, 1901, this office ruled that reversionary interests which are vested are taxable on their present worth."

"The amendments which the administrative officers decided made subject to taxation vested interests where the right of immediate possession or enjoyment had not accrued, * * * were that the tax or duty should be due and payable in one year after the death of the person from whom the estate had passed, and that the executor, administrator, or trustee should make return of the estate in his control within thirty days after taking charge thereof."

These provisions "imply only that a uniform period was fixed within which the obligation should arise of paying the tax authorized to be levied by the original act; that is, the obligation of paying the duty on each beneficial interest which in effect had vested in possession or enjoyment. The amendments, therefore, did not, in our opinion, justify the construction that Congress intended, by adopting them, to cause death duties to become due within one year as to legacies and distributive shares which were not capable of being immediately possessed or enjoyed, and were therefore not subject to taxation under the original act. This conclusion irresistibly follows when it is observed that no word is found in the amendatory act importing an intention to change the administrative construc-

tion which had theretofore prevailed from the beginning. On the contrary, the amendatory act reiterated, without alteration, the provisions found in the original act as to possession or enjoyment and beneficial interest and clear value.''

Said section 29 was repealed by the Act of April 12, 1902, the repealing act saving all taxes imposed thereby ''prior to the taking effect of this act.''

The Act of June 27, 1902, provided that the secretary was authorized and directed to refund ''so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior'' to July 1, 1902.

''In view of the provision for refunding we see no escape from the conclusion that this statute was in a sense declaratory of what we hold was the true construction of the act of 1898, and which, as we have seen, had prevailed prior to the amendment of March 2, 1901, and which was only departed from by the administrative officers under a misconception of the import of that amendatory act. * * *

''From this it results that the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected on contingent beneficial interests which had not become vested prior to July 1, 1902, were taxes levied on such beneficial interests as had not become vested in possession or enjoyment prior to the date named, within the intendment of the subsequent sentence. * * *

''Concluding, as we do, that there was no authority under the Act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned on his attaining the ages of thirty and thirty-five years, respectively, it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the government.''

The question was answered in the negative.

VEAZIE BANK v. FENNO

(U. S. Supreme Court, December, 1869)

(8 Wall. 533)

Record: Act of July 13, 1866. Suit to recover taxes paid. On certificate of division for the Circuit Court for Maine. Government's right to the tax upheld.

Facts: The Veazie Bank, a Maine corporation with authority to issue bank notes for circulation, was assessed a tax on its circulation of bank notes under the Act of 1866. The Act imposed a tax of 10 per cent on state or national banks paying out the notes of persons or state banks used for circulation. The bank refused to pay the tax until Fenno, the collector, began distraint proceedings to collect, when it paid the tax under protest. The Commissioner rejected an application for refund. The bank contended that the act was unconstitutional.

Questions: (1) Was the tax a direct tax and so unconstitutional because not apportioned?

(2) Did the Act impair a franchise granted by the state and so was illegal?

Decision: (1) Following a review of the history of direct tax legislation by Congress the court said, "It may be rightly affirmed, therefore, that in the practical construction of the constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes." The court drew the same deduction in the case of Hylton v. United States, 3 Dallas 171 (ante).

"It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of

Pacific Insurance Company v. Soule (74 U. S. 433 [ante 391]) held not to be a direct tax."

(2) "But it can not be admitted that franchises granted by a state are necessarily exempt from taxation; for franchises are property, often very valuable and productive property. * * * But in the case before us the object of taxation is not the franchise of the bank, but property created or contracts made and issued under the franchise, or power to issue bank bills."

The contention is also made that the tax is so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank and is therefore beyond the constitutional power of Congress, but "the judicial can not prescribe to the legislative department of the Government limitations upon the exercise of its acknowledged powers." Furthermore, as Congress may constitutionally authorize, the emission of bills of credit and provide for safeguarding the benefit thereof to the people, it can also restrain by suitable enactments the circulation as money of any notes not issued under its own authority.

VICKSBURG, SHREVEPORT & PACIFIC R. R. CO. v. DENNIS

(U. S. Supreme Court, March 1, 1886)

(116 U. S. 665)

Record: Exemption clause in the charter of a Louisiana corporation and contract clause of the U. S. Constitution. Suit by sheriff for state taxes. Judgment for plaintiff. Writ of error to the Supreme Court of Louisiana. Affirmed.

Facts: The sheriff and ex-officio collector of taxes in Louisiana sued for state taxes against the company. The company's predecessor was incorporated on April 28, 1853, by Louisiana. Section 2 of its charter provided that the capital stock of the company should be exempt from taxes and its road, etc., "shall be exempt from taxation for ten years after the completion of said road within the limits of this state." The two ends of the road were completed but the central part, about one hundred miles, was not completed at the outbreak of the Civil War, during the continuance of which the further construction was prevented, and much of the track was

destroyed by the hostile armies. Soon after the return of peace, a bondholder secured a decree for the sale of the mortgaged property of the company. Thereafter a large number of bondholders had this sale set aside as fraudulent and another sale was made. The purchaser was a committee of the bondholders who organized themselves into a Louisiana corporation. In 1881 and 1882 the new corporation made contracts for the completion of the railroad, but it had not been completed at the time of the suit. The Louisiana Supreme Court held that the provision for exemption of the road did not relieve the old corporation from taxation before the road was completed and therefore gave judgment for the plaintiff without determining whether the new corporation had succeeded to the rights of the old one in this respect.

Question: Was there a contract between the state and the new corporation for exemption from taxation before the completion of the road?

Decision: The court decided that an intention to surrender the taxing power of a state will not be presumed where the legislature has not manifested it in clear and unmistakable terms. "In their natural and their legal meaning, the words 'for ten years after the completion of said road' as distinctly exclude the time preceding the completion of the road, as the time succeeding the ten years after its completion. If the Legislature had intended to limit the end only and not the beginning of the exemption its purpose could have been easily expressed by saying 'until' instead of 'for,' so as to read 'until ten years after the completion,' leaving the exemption to begin immediately upon the granting of the charter."

WALKER v. GROGAN, COLLECTOR

(U. S. District Court, E. D. Michigan, S. D., August 26, 1922)
(283 Fed. 530)

Record: Estate Tax Act of September 8, 1916, as amended March 3, 1917. Action to recover taxes paid to the collector. Decision for plaintiff. (Writ of error dismissed, 263 U. S. 725.)

Facts: The testator, Kent, held at the time of his death certain real estate and stocks in joint tenancy with his wife. Said

property was acquired prior to the passage of the Revenue Act. The executor paid an estate tax upon one-half of the value of the property held in joint tenancy. The collector demanded the tax upon the full value of the property so held, which was paid under protest. Plaintiff contended that the statute could not refer to estates in joint tenancy or by entireties created before the enactment of said section, as that would be to subject to a transfer tax property already transferred. The Government insisted that such section operated retroactively.

Question: Should the full value of the jointly owned property be included in the value of the gross estate used as a basis for the computation of the estate tax?

Decision: "After the submission of the cause, * * * this contention of the Government was decided adversely to it by the United States Supreme Court in the case of Knox v. McElligott," 258 U. S. 546 (ante 915). The court decided that the property was held in joint tenancy and not by tenancy in the entirety, and that judgment should be entered for the plaintiff.

WALTER et al. v. DUFFY, COLLECTOR

(U. S. Circuit Court of Appeals, Third Cir., February 15, 1923)

(287 Fed. 41)

Record: Revenue Act of 1916. Suit to recover income tax collected on account of alleged profit on the sale of stock. Judgment for defendant. Writ of error. Reversed and new trial ordered.

Facts: In 1913, New Jersey provided for the mutualization of its insurance companies and authorized valuation of their shares. Then and long prior thereto, plaintiff's deceased, Mrs. Blanchard, had owned stock of the Prudential Insurance Company. There was no proof as to the cost of her stock. The Commissioners' investigation covered three years. It fixed the value at $455 per share and this was affirmed by the state court and the mutualization of the company by the purchase of its stock at that price was authorized. In pursuance thereof, Mrs. Blanchard transferred her stock to the company and received that price. The taxing authorities

valued her stock at $262.50 a share on March 1, 1913, as the "fair market price or value" on that date and collected tax on the difference, over her protest. No contention was made that the company had changed and the court ruled out an offer to prove that during the years 1913, 1914 and 1915, while this valuation was being made, it had not changed its financial status or made any gains or losses which affected the value of its stock.

Question: Under the peculiar facts of this case, what are the elements determining "fair market price" as provided by the statute?

Decision: "If the ascertained value of $455 in 1915, which Mrs. Blanchard got from the company, is the true value of her stock, her stock was of that same intrinsic value, viz: $455, when the statutory valuation proceedings were begun in 1913; was their value on March 1, 1913 * * * and remained $455 during 1914 and 1915." What Congress meant to tax was "the gain derived from the sale or other disposition of the property" and the basis for determining the amount of such gain was, first "* * * the primary, well-recognized and commercially determined evidence of value, viz: 'the fair market price,' where it existed, but when that could not be done, as would manifestly be the case where no fair market price existed, then resort must be had to the second method, viz: ascertaining 'the fair * * * value of such property'. * * * From the standpoint of value, real and intrinsic, her stock value was essentially identical at both periods; consequently, she derived no gain from it in that particular period. It is clear, therefore, that if taxable gain was derived and rightly assessed by the taxing officers, it must come not from any act of hers or of the company, but from the fact that other holders of stock by sales of their stock impressed a statutory value on her stock from which her subsequent 'gain derived' was to be reckoned and a tax imposed. * * *"

"What is the fair market price of the statute? We say 'fair,' since every word used by Congress must be given due effect in the construction of this widely applicable statute, for obviously * * * Congress by the addition of the words 'fair market price,' certainly meant that not only must the market price be ascertained by sales, but that sales so made, the circumstances under which they were

made, the subject-matter of the sales, all the attendant circumstances, were to be considered to determine whether such sales served to evidence not alone a market sale but the fair price which Congress said should be the statutory start or base from which subsequent 'gain derived' should be determined."

"Standing alone, offers to sell, with no takers, or offers to buy, with no sellers, show no such concurring willing action of buyer and seller as is involved where a market is made by buyers and sellers who by their respective sales and purchases make a market price which the law taxes as evidence of value. * * * That the stock of the company was not traded in generally, is clear. The mutualization in progress, the limited holdings of the stock, its acquisition from time to time by those who bought with a view to holding and awaiting the action of the mutualization, commercially were all factors of unusual character, and made the valuation different from a market created by buyers willing to buy and sellers willing to sell, and where offers to sell challenged the attention of buyers, and offers to buy challenged the attention of sellers."

"Bearing in mind that there are forty thousand shares of this stock outstanding, and that the entire sale, covering the several years here involved, was but six or seven hundred shares, we must also note that some four hundred and eighty-eight shares were forced sales, and that no sales of any character took place nearer than six months to March, 1913."

The court erred in holding that the few sales actually made established the statutory fair market value. "Indeed, the fact that it had to be sold in small lots, that it took a space of two years to make it, that buyers had to be hunted to take it, and that the banks which sold were insistent on forcing it to sale, and were only interested in getting a price to cover their loans, these were all elements which showed that the price obtained was not conclusive proof of the 'fair market price' contemplated by the statute, and it was error not to admit proof of the circumstances under which the sales were made and evidence tending to establish the intrinsic value of the stock on March 1, 1913."

WARD et al. v. HOPKINS, COLLECTOR

(U. S. District Court, N. D. Texas, Dallas D., February 27, 1924)
(Not reported)

Record. Revenue Act of 1918 and Article 1561, Regulations 45, 1920 edition. Suit for the recovery of additional taxes paid. Judgment on verdict for plaintiff for a part of the amount claimed.

Facts: A return for the income for 1919 was submitted by Mr. Ward and tax paid accordingly. His records were examined by an agent of the Bureau of Internal Revenue and an additional tax was assessed. This was paid under protest and duress. A claim for refund having been denied, suit was brought for its recovery. The case was tried before a jury, and the issue presented was as to the market value of certain real estate on March 1, 1913, to fix the profit on a sale in 1919. The government added to the selling price the depreciation between March 1, 1913, and the date of the sale, and plaintiffs contended that this was not allowed by the law. At the trial the government offered certain evidence as to the valuation placed upon said real estate for local taxation during the years up to 1919.

Questions: (1) May depreciation be considered in fixing the profit on the sale of property?

(2) May returns for state taxes be considered in determining the March 1, 1913, value, or the increase in value since that date?

Decision: (There was no written opinion in this case, and the following has been taken from the typewritten record.)

(1) At the trial the Government produced a witness to testify as to why depreciation charges were added to the sale price in ascertaining the income on the transaction. This testimony was objected to and ruled out, the court stating that it believed the Department's regulations on the subject were erroneous. The Government contended that if it were not allowed to take advantage of the depreciation on the sale, then the taxpayer should not be allowed to take advantage of such depreciation in his income tax return. The court said that the executive department allowed him to take the benefit of that depreciation, but that a man pays a tax on what he makes, "and certainly he does not make anything that he loses."

(2) The Government contended that the value of the property in 1919 having been fixed by the sale, the proportionate increase in value might be shown by the proportionate increase in the value of the property as given by tax renditions made by the taxpayer for local taxes in that year and preceding years. At first, evidence of such local tax returns was excluded from the jury, but finally the judge allowed to be presented to them such evidence as to the years 1913 and 1919, the taxpayer having testified that for those years he had returned the values shown by the local records.

WASHINGTON WATER POWER CO. v. UNITED STATES

(U. S. Court of Claims, February 14, 1921)

(56 Ct. Cls. 76)

Record: Acts of September 8, 1916, and October 1, 1890. Petition to recover sums paid as capital stock tax. Petition dismissed.

Facts: "On January 30, 1917, the plaintiff made a return [under the 1916 act] for the six months ending June 30, 1917, showing that it was liable for the payment of $2,977.75, and attached thereto a written protest against making the return. The plaintiff paid the sum above shown * * * without protest. On the 25th of July, 1917, the plaintiff made another return in the sum of $5,458.50 to which was attached a protest, and on the 13th day of September, 1917, paid this sum to the Collector of Internal Revenue, attaching a protest against payment." The protest in each instance specified that the returns and the taxes were not then due. On October 28, 1917, the plaintiff applied for a refund, which application was denied. Suit was filed February 26, 1919.

Question: Was the tax assessed and collected in advance of the time when due, and was it therefore illegal?

Decision: The act speaks of the tax as a "special excise tax"; the Act of 1890 provides that special taxes be collected in advance; the Act of 1916 in Section 409 makes all administrative and special provisions, including assessment provisions, of prior laws a part of the act so far as applicable; the act also requires returns under oath and in compliance with the regulations of the Commissioner,

etc.; and it further provides that the tax shall be computed on the basis of the fair average value of the capital stock of the preceding year. The Commissioner therefore was within his authority in requiring the returns to be filed and the tax paid in advance.

"The matter might be disposed of without further comment on the familiar principle that a suit can not be maintained to recover taxes once paid, and which were, in fact, due, because the manner of collection of the tax was not authorized."

But to give another ground, the tax that plaintiff paid in January, 1917, would even by his contention have been due on July 1, 1917, and the other tax on July 1, 1918, while this suit was begun on February 26, 1919, a time later than when both taxes were due and payable under plaintiff's theory.

WEISS, COLLECTOR, v. STEARN
WEISS, COLLECTOR, v. WHITE

(U. S. Supreme Court, May 26, 1924)
(265 U. S. 242)

Record: Revenue Act of 1916. Suit for recovery of tax paid. Judgment for plaintiffs was affirmed by the Appellate Court. The Supreme Court affirmed on certiorari.

Facts: The stockholders of National Acme Manufacturing Co., an Ohio corporation with a capital stock of $5,000,000, endorsed their certificates of stock therein and delivered them to a depositary. Eastman, Dillon & Co. deposited $7,500,000 with this depositary. Then representatives of both classes of depositors organized the National Acme Company, another Ohio corporation with $25,000,000 authorized capital stock and powers similar to those of the old corporation. The new corporation acquired the entire assets and business of the old one, assuming all its liabilities and in payment therefor issued to the depositary its entire authorized capital stock. The old corporation was dissolved. The depositary delivered to Eastman, Dillon & Co. certificates for half of the stock of the new corporation, delivering the other half proportionately to the owners of the stock of the old corporation, together with the $7,500,000. Each of said owners received for $100 of old stock $150 cash and $250 of stock of the new corporation. This stock

represented an interest in the property and business one-half as large as he had before.

The collector assessed the tax against each old stockholder on the basis of his having sold his entire holdings. The courts below held that the stockholder sold one-half for cash and exchanged the other half, without gain, for the same proportionate interest in the new corporation, having the same assets and liabilities.

Question: What is the proper basis for the tax in this case?

Decision: "We agree with the conclusion reached below. The practical result of the things done was, a transfer of the old assets and business, without increase or diminution or material change of general purpose, to the new corporation; a disposal for cash by each stockholder of half his interest therein; and an exchange of the remainder for new stock representing the same proportionate interest in the enterprise. Without doubt every stockholder became liable for the tax upon any profits which he actually realized by receiving the cash payment. If by selling the remainder he hereafter receives a segregated profit, that also will be subject to taxation."

"We cannot conclude that mere change for purposes of reorganization in the technical ownership of an enterprise, under circumstances like those here disclosed, followed by issuance of new certificates constitutes gain separated from the original capital interest. Something more is necessary, something which gives the stockholder a thing really different from what he theretofore had. * * * The sale of part of the new stock and distribution of the proceeds did not affect the nature of the unsold portion; when distributed this did not in truth represent any gain."

WEST VIRGINIA PULP & PAPER COMPANY v. BOWERS, COLLECTOR

(U. S. District Court, S. D. New York, August 1, 1923)
(293 Fed. 144)

Record and Facts: Facts are not stated other than as given below. (This case was affirmed on appeal, 297 Fed. 225, following Edwards v. Wabash Ry. Co., 264 Fed. 610, ante 193, Trumbull

Steel Co. v. Routzahn, 292 Fed. 1009, ante, and American Laundry Co. v. Dean, 292 Fed. 620, ante, the court stating that changes in treasury decisions do not change the law. Certiorari was denied by the Supreme Court, May 5, 1924.)

Question: Was this an original issue of stock, subject to the stamp tax?

Decision: "What plaintiff did, in my opinion, is not to be regarded as an original issuance of stock, either upon organization or reorganization. No essential change in the capital with which plaintiff does business has taken place, and the right of its stockholders has been neither increased nor lessened. They continue to hold their respective portions of the original issue of stock, save that such portions are now evidenced by an increased number of pieces of paper, and these they may have without their corporation being subjected to the tax assessed against it. Defendant's motion for judgment of dismissal is denied and unless defendant desires to litigate the allegations of fact set up in the complaint there is no reason why plaintiff should not have judgment for the sum sued for."

WESTHUS et al. v. UNION TRUST CO.

(U. S. Circuit Court of Appeals, 8th Cir., November 4, 1908)
(164 Fed. 795)

Record: Act of June 13, 1898, as amended by Act of March 2, 1901, and Acts of April 12, 1902, and June 27, 1902. Suit to recover a legacy tax paid. Demurrer to answer. Judgment for plaintiff. Writ of error. Reversed.

Facts: Madill died December 11, 1901, bequeathing all his property not required for debts and certain specific legacies to the trust company, in trust, after certain deductions, to divide it into three equal parts, etc. The case involves but one of these parts. The will provided that the trustee should pay the net income of this part to testator's son during his life-time, with remainders after his death to other persons upon various contingencies. The will denied the son the right to anticipate this income or to make any disposition of it before its receipt, and neither income nor corpus was to be subject to testator's debts. The trust company was discharged as executor April 6, 1904. About four months after the

death of the testator, the trust company paid the son on account of his legacy $2,000. In January, 1905, the Government exacted the payment of this tax in respect to the life estate of the son. The Act of 1901 provided that the tax should be due and payable in one year after the death of the testator and was to be a lien and charge on the testator's property for twenty years, unless sooner paid. The Act of April 12, 1902, repealed those provisions of the Acts of 1898 and 1901, with a saving clause as to all taxes that had been "imposed" before July 1, 1902. The Act of June 27, 1902, provided for the refunding of taxes that had been collected on account of contingent beneficial interests which had not become vested in possession or enjoyment prior to July 1, 1902, and forbade the imposition of such taxes in the future.

Questions: (1) Was the interest of the son in the income of the trust estate a contingent one, not vested in enjoyment and exempt from the tax?

(2) When was the tax imposed?

Decision: (1) "We think the bequest to Charles A. Madill was absolutely vested in enjoyment at the death of the testator. The right of the legatee to the enjoyment of the income was not postponed to the end of a precedent estate, nor was it made to depend upon the happening of any contingency or uncertain event. A present and immediate right passed to him, not subject to devestment short of his death. * * * True, the precise amount of the income depended upon the amount or value of the corpus of the trust property, the definite ascertainment of which might have to await the payment of debts and the preparation of schedules * * *. The income bequeathed began to accrue from the day the testator died."

(2) Section 30 of the original act, as amended by the Act of 1901, provided that the tax should be due and payable one year after the death of the testator and should be a lien upon his property for twenty years or until (within that time) the tax should be fully paid. The trust company contended that as the testator died December 11, 1901, the tax did not become due until December 11, 1902, and therefore was destroyed by the repealing act, because it had not become "imposed."

Section 29 provided that persons having legacies in charge "shall be and hereby are made subject to a duty or tax, etc. And we think that when there came into existence the conditions upon which the statute operated the tax was at once imposed, and the estate of the decedent became subject to a lien therefor. * * * The imposition of a tax and its maturity are distinct and separate things, and are commonly recognized to be so in schemes of taxation. To impose a tax means to levy it, and we all know that it is not the general custom to make a tax due and enforcible the very day it is imposed or levied. The levy of taxes by state boards * * * is generally long in advance of the day they become due, when, if not paid, proceedings for enforcement may be begun. * * * A lien may be created to commence from either the imposition or levy of a tax or from its due date, as in the judgment of the legislative body may seem advisable." The court thought the lien attached immediately upon the death of the testator.

(On a petition for rehearing, the court decided, 168 Fed. 617, that a judgment of affirmance by an equally divided appellate court conclusively settles the rights of the parties in the particular litigation but does not establish a precedent in the court which rendered it, and does not control inferior tribunals in other cases.)

WILSON v. EISNER, COLLECTOR

(U. S. Circuit Court of Appeals, Second Cir., April 3, 1922)

(282 Fed. 38)

Record: Revenue Act of 1913. Action to recover income taxes. Judgment of the District Court of the United States for the Southern District of New York for the defendant reversed.

Facts: The plaintiff, a resident of New York, rented a farm in Kentucky which he subsequently purchased. In his return for 1913 he entered an item of $33,338.30 as his income derived from the business of breeding horses and raising stock on the farm, and an item of $52,357.35 as expense thereof. He, therefore, took a loss of $19,919.05. The Collector refused to allow this loss as a loss resulting from a business transaction entered into for profit. His income was derived from the sale of horses and from prizes at horse races and county fairs. The horses were registered animals.

Question: Was this a business loss?

Decision: "All the essentials of business were present in the enterprise undertaken by the plaintiff * * *. The years 1909, 1916, 1919 and 1920 showed a profit and he gave the benefit of this to the Government by paying taxes therefor. The years 1910, 1911, 1912, 1913, 1914, 1915, 1917 and 1918 showed a loss. The amount of his losses for the years questioned here are not disputed. Raising and breeding horses may well be an enterprise entered into as business for profit."

WITHERBEE v. DUREY, COLLECTOR

(U. S. District Court, N. D. New York, January 12, 1924)

(296 Fed. 576)

Record: Section 250 (d), Revenue Act of 1921. Bill to enjoin collector from executing a warrant of distraint for the collection of an alleged additional income tax. Temporary injunction denied and bill dismissed.

Facts: The tax was for the year 1917.

Question: Should such an injunction issue?

Decision: "Though the warrant of distraint was not issued until after five years from the date of filing the return for the year 1917, the assessment of the alleged additional tax, and two demands for payment were made upon the plaintiff, within five years from the date of filing the return. By reason of such assessment and demands, section 250 (d) of the Revenue Act of 1921, on which the plaintiff relies, does not apply. The facts bring the case into close analogy to Graham v. Du Pont, 262 U. S. 234 [ante], which is controlling here. See, also, Bashara v. Hopkins (D. C.) 290 Fed. 592. Had no assessment, demand, or attempt to collect the tax been made within the five-year period, plaintiff would be entitled to the relief sought."

WOERISHOFFER et al. v. UNITED STATES

(U. S. Court of Claims, June 4, 1923)

(58 Ct. Cls. 410)

Record: Act of June 13, 1898, as amended. Suit to recover a legacy tax paid. Petition of plaintiff dismissed. (Pending in Supreme Court.)

Facts: Testator died on December 14, 1900, while a resident of New York, leaving a will and codicils, all of which were admitted to probate on March 24, 1901, on which date letters testamentary were issued. The will provided that all succession, legacy or inheritance taxes that should be due and payable by law on any legacy passing under the will or codicils should be deducted from and paid out of the residuary estate, so that all legatees should receive their legacies free of all such taxes.

Pursuant to the Act of June 13, 1898, the executors filed a schedule of legacies arising from said estate with the Commissioner of Internal Revenue on November 7, 1902. The tax indicated as due on said return was paid on December 10, 1902, without protest. No legacy tax was assessed prior to July 1, 1902, on any of the legacies. On that date, the Act of April 12, 1902, repealed the Act of 1898. Prior to July 1, 1902, all the specific and part of the residuary legacies were paid.

Questions: (1) Was the tax "imposed" by Section 29 of the Act of June 13, 1898, and amendments thereof, although not assessed nor collected until after the act was repealed?

(2) If the tax was "imposed," were the assets which were paid to the residuary legatees prior to July 1, 1902, in part satisfaction of the residuary legacies, vested in the said legatees in possession or enjoyment prior to July 1, 1902, under the provision of Section 3 of the Act of June 27, 1902?

(3) Where the required time has elapsed to give the legatees and distributees a right to demand payment of the legacies and where the assets in the hands of the executors are sufficient to pay all known liabilities, does the fact that these liablities were not definitely and finally determined on July 1, 1902 (since other liabilities might arise subsequently) make the legatees' right "contingent" and not "vested" in enjoyment and possession?

Decision: (1) "It is not disputed that a tax may be imposed without assessment and that an assessment is not a prerequisite to the imposition of a tax. While some taxes may require assessment and may not be collected until assessed, this does not prevent Congress from imposing a legacy tax until after it has been assessed.

If the act imposed a tax, an assessment is a matter of routine which does not alter the effect of its imposition. To impose a tax means to levy it. The imposition of the tax and its maturity are distinct and separate things. It is well known that it is not customary to make a tax due and enforceable upon the day of its imposition. Cochran v. United States, 254 U. S. 387 [ante 144] * * * Westhus v. Union Trust Co., 164 Fed. 795 [ante]. * * *

''The tax is on the right of succession, and when by death there passes a vested right to the immediate possession or enjoyment of a legacy or distributive share, there is imposed a tax under the Act of June 13, 1898. Hertz v. Woodman [218 U. S. 205, ante]. So that it follows that the tax collected in this case was imposed under Section 29 of the Act of June 13, 1898.''

(2) Section 3 of the Act of June 27, 1902, provided that the Secretary of the Treasury was authorized and directed to refund so much of the tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902. The act prohibits the assessment of any tax upon any contingent beneficial interest which should not become absolutely vested in possession or enjoyment prior to July 1, 1902.

''A contingent interest is one thing and a vested interest subject to divesture is another. The law uses familiar legal expressions in their familiar legal sense, and the distinction between a contingent interest and an interest subject to be divested, is familiar to the law. As to that part of the property transferred by the executors prior to July 1, 1902, to the residuary legatees, there can be no question under the decisions that it vested in possession and enjoyment prior to July 1, 1902. Henry v. United States, 251 U. S. 393 [ante 256], Cochran v. United States, supra. See also Tiffany v. United States, Court of Claims, No. 33685.''

(3) ''Under the statute of New York if a year had expired from the commencement of the administration—and here it expired March 24, 1902—the legatees have a right to demand and proceed for collection of their legacies. During this period executors have the right to withhold payment so that prior to July 1, 1902, there is no doubt about the interest being vested and the liability of the

executors to pay the legacies, providing there were sufficient funds in hand with which to do it. It is admitted that sufficient funds were in hand, and that all of the known debts, except as heretofore stated, have been paid and the time for filing claims had expired nearly nine months before, and that the only known debts and liabilities were the state and federal taxes, attorneys' fees, and certain expenses of administration. The fact that these had not been determined and that the sum necessary to meet them had not been fully and exactly ascertained is not sufficient to turn into a contingent interest an interest which is already vested in enjoyment and possession and therefore subject to tax under the Act of June 13, 1898. The mere fact that the executors concluded to keep a fund on hand to meet certain unknown chances or claims that might arise can not of itself divest this vested interest of the legatees nor turn it into a contingent interest."

WOODS v. LEWELLYN, COLLECTOR

(U. S. District Court, W. D. Pennsylvania, November Term, 1921)
(289 Fed. 498)

Record: Act of October 3, 1917. Suit to recover excess profits taxes paid under protest. Judgment for the plaintiff.

Facts: The plaintiff was a general agent for a life insurance company prior to 1911. At that time he, with business associates, incorporated a life insurance corporation in which he held over 80 per cent of the stock and which continued the general agency previously carried on by himself as an individual. During the year 1917, plaintiff was president and manager of the corporation. His services were concededly worth $30,000 per year and his salary was subsequently fixed at that sum. During that year he received renewal commissions amounting to over $52,000 to which he had become entitled by reason of his activities in procuring insurance prior to the organization of the company.

Question: Was the plaintiff liable under Section 209 of the Act of October 3, 1917, for taxes assessed against the income received for renewal commissions?

Decision: The court held that the plaintiff was not liable for the excess profits tax upon the commissions since Section 209 was

interpreted as placing a tax upon the vocation of the man who had done business during the year without invested capital. It was held to tax only income derived from activities in the exercise of the regular occupation, not sums earned incidentally by activities outside that regular occupation. The court referred to Lederer, Collector v. Cadwalader, 274 Fed. 753 (ante 920), and pointed out that the plaintiff had acted as president and manager of the corporation continuously during the year, and that his services as such were worth to that corporation at least $30,000 and that commissions of $2,700 which he received during the year for business written by him were not sufficient to indicate that his regular vocation was that of an insurance agent. He had claimed in his return $4,600 as business expenses, but the court said it did not follow that such sum was not "claimed pursuant to the exercise of an incidental or isolated activity."

YOUNG v. ILLINOIS ATHLETIC CLUB

(Supreme Court of Illinois, October 20, 1923. Rehearing denied December 7, 1923)

(310 Ill. 75)

Record: Suit to recover from lessee income tax paid by lessor on rentals. Judgment of dismissal. Affirmed.

Facts: The club had leased property for 99 years from plaintiff and she sued to recover income taxes she had paid because of the receipt of the rentals for the years 1919 and 1920. The lease provided that the lessee further agreed to pay as additional rent, all taxes, etc., "levied, imposed or assessed upon any interest of the lessor in or under this lease," or "which the lessor shall be required to pay by reason of or on account of his interest in the real estate hereby demised and the improvements on said real estate."

Question: Is the federal income tax in this case a tax imposed upon an interest in real estate?

Decision: "It has been the universal holding of courts considering the question, so far as we are able to find, that unless the lease expressly provides for the payment of taxes on the income or rentals received under the lease the imposition of such

burden on the lessee is not justified. No case has been cited, and we are unable to find one, holding that an income tax is a tax on an interest in land; and the nature of the tax itself, which is a tax made on the net income of the individual, is such as to preclude the idea of a tax against property.

An illustration is given of a lessor who in one year suffers loss in connection with his property, which, with his exemption, relieves him from the payment of all income taxes, while, in another year he receives a large amount, besides the rentals, and the court said that it was readily seen that there was no way of determining how much would be the amount of tax to be proportioned to the rentals. "This is repugnant to the idea of a tax against the property itself. Such a tax is not a tax against the real estate and * * * cannot, in the absence of terms which expressly or by clear implication include it, be made a part of a covenant in a lease. We are of the opinion that it was not the intention of the parties to this lease that the income tax levied on the rentals should be paid by the lessee."

YOUNG MEN'S CHRISTIAN ASSOCIATION et al. v. DAVIS et al.

(U. S. Supreme Court, February 18, 1924)

(264 U. S. 47)

Record: Estate tax, Revenue Act of 1918. Suit in a state court to determine whether the estate tax should be charged against specific legacies and devises or against the residuary estate which went to charitable and educational institutions. The state courts, including the Ohio Supreme Court, determined that the tax should be paid from the latter, and that judgment was affirmed by the U. S. Supreme Court on certiorari.

Facts: Marry J. Sessions died testate April 1, 1919. The executors paid the estate tax of $31,000. After certain specific legacies and devises, the testatrix gave the residue of her estate to the Young Men's Christian Association and other charitable and educational institutions. The statute provided a graduated tax according to value and provided for certain deductions in arriving at the net estate, including legacies or devises to "any corporation

organized exclusively for religious, charitable, scientific, literary or educational purposes.''

After paying the tax, the executor brought suit in the state court of common please for directions as to whether the tax should be deducted from the specific legacies and devises or from the residuary estate. That court, the Court of Appeals and the State Supreme Court, all held that the tax should be taken from the residuary estate. The case was taken by certiorari to the U. S. Supreme Court.

Question: Should the estate tax be charged against specific legacies and devises or against the residue, which went to charitable and educational organizations?

Decision: It was argued that the decisions of the state courts made the residue, which was exempt, pay the tax. ''What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.''

''Congress was in reality dealing with the testator before his death. It said to him: 'If you will make such gifts, we'll reduce your death duties and measure them not by your whole estate, but by that amount, less what you give.' In Section 408 it is declared to be the intent and purpose of Congress that, as far as it is practicable, and unless otherwise directed by the testator, the tax is to be paid out of the estate before distribution.''

''It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor, if she chose. It must be presumed, when she failed to exercise the power, that she intended the incidence of the tax to be where otherwise by law it must be, and therefore, that it was her purpose that her residuary legatees were to receive all that was left after paying all charges, including this tax, out of her estate. The donees of the altruistic gifts profit much by the deduction made under subdivision (3), even though they do receive less by the

amount of this tax. Had subdivision (3) not been in the statute, the tax would have been much heavier, measured by a higher percentage of the value of the whole estate, including their gifts. It is hardly true to say that, under the judgment of Ohio courts, these residuary gifts are taxed. The gifts are, and were intended by the testator to be, indefinite in amount, and to be what was left after paying funeral expenses, attorneys' fees, executor's compensation, debts of the decedent, and taxes. These donees do not pay the funeral expenses, the lawyers, the executors, and the testator's debts.''

TABLE OF CASES

ABSTRACTED IN 545 U. S. TAX CASES (PP. 67-618), FIRST SUPPLEMENT (PP. 835-1011) AND THIS SECOND SUPPLEMENT (PP. 1095-1585)

(The words "Aff.," "Rev." and "Modified" refer to the decision immediately preceding, in each case.)

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